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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

E. J. LEIZERMAN

Petitioner,

v.

TOLEDO BAR ASSOCIATION

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITION FOR A WRIT OF CERTIORARI

Michael E. Tankersley
(*Counsel of Record*)
Alan B. Morrison
Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 833-3000

Mark H. Aultman
Charles W. Kettlewell
150 E. Wilson Bridge Road
Suite 200
Worthington, Ohio 43085
(614) 436-2750

Counsel for Petitioner

January 26, 1993

38 pp

QUESTIONS PRESENTED*

1. Where federal courts have declared that it is ethically permissible for lawyers to guarantee their clients' loans for medical and living expenses that the clients need to withstand delays in litigation, may states, consistent with the Supremacy Clause, prohibit lawyers from guaranteeing such loans when representing Federal Employers' Liability Act claimants in federal court?

2. Does a state prohibition on attorneys guaranteeing their clients' loans for medical and living expenses that the clients need to withstand delays in litigating their personal injury claims unconstitutionally impair the rights of access to the courts recognized under the First and Fourteenth Amendment, where the state concedes that the loan guarantees are not used to solicit clients, and do not compromise the attorneys' independent professional judgment?

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* In addition to parties the listed in the caption here, attorney Michael E. McGill was also a party to the proceedings below as a respondent, with petitioner Leizerman. *See* A1, A8, A10.

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Ohio is reported at 64 Ohio St. 3d 669, and is reprinted in the Appendix to this petition at pages A1-6. The Findings of Fact, Conclusions of Law, and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio is not reported, and is reprinted in the Appendix at pages A7-14.

JURISDICTION

The decision of the Supreme Court of Ohio was issued on September 16, 1992. A1. A timely petition for rehearing by petitioner E.J. Leizerman was denied on October 28, 1992. A15. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

DR 5-103(B) of the Code of Professional Responsibility of the State of Ohio provides as follows:

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

Petitioner also relies on the First Amendment and Fourteenth Amendments to, and the Supremacy Clause in Article VI of, the Constitution of the United States, which are set forth in the Appendix at A16.

STATEMENT OF THE CASE

The Toledo Bar Association brought disciplinary proceedings against Petitioner E.J. Leizerman for assisting injured clients in obtaining bank loans for medical and living expenses pending delays in resolution of their claims for lost income and other compensation under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 ("FELA"). The Ohio Board of Commissioners on Grievances and Discipline found that petitioner had not engaged in any improper solicitation, that the loans were given only to existing clients who needed the money to withstand delays

in litigation, and that the loan guarantees had not interfered with petitioner's obligation to exercise independent professional judgment on behalf of his clients. Nonetheless, the Board and the Ohio Supreme Court concluded that DR 5-103(B) of the Ohio Code of Professional Responsibility, which states that a lawyer shall not guarantee financial assistance to a client, except litigation expenses, flatly prohibits a lawyer from guaranteeing loans for medical or living expenses, even under the circumstances presented here.

Petitioner seeks review by this Court because Ohio's prohibition on guaranteeing loans needed to survive litigation delays forces FELA claimants to forfeit their right to trial and accept inadequate settlements. This application of the Ohio rule is preempted by federal court decisions holding that such loans are appropriate because they allow FELA claimants to vindicate their rights. In addition, it violates rights of access to the courts recognized by this Court's decisions under the First and Fourteenth Amendments.

A. *Evidence Concerning Loans to Clients.*

Petitioner E. J. Leizerman has been a member of the Ohio Bar since 1976. His primary area of practice is representing personal injury claimants, and the majority of his cases involve claims under the FELA. Apart from this case, he has never been the subject of a disciplinary proceeding. A2, A11. Petitioner cooperated fully with the Bar Association's investigation, and the hearing in these proceedings was conducted on the basis of stipulated facts, exhibits, affidavits, and one-day of live testimony, *see* A8-10, which established the following facts about the loans at issue.

Petitioner and his former associate, Michael E. McGill, represented several personal injury claimants who were unable to work due to their injuries, and lacked any

other adequate sources of income. Because of court delays, obtaining a hearing on their claims for lost wages and other compensation could take two to four years. Hearing Tr. at 33, 42. During this period, the claimants were left without funds for medical treatment and support. Without financial assistance, they would have been forced to settle their claims "on the basis of desperation and not the reasonable value" of their case. A22 (Affidavit of Jerry W. Smith ¶ 8).

The evidence also showed that the railroad industry, taking advantage of the economic pressure that prolonged litigation places on unaided personal injury claimants, "intentionally attempts to delay FELA cases in order to force injured employees to settle their claims." A12. A retired claims adjuster for Consolidated Rail Corporation stated that the carrier "frequently and purposely delayed the resolution of and settlement of cases," particularly with respect to persons who were unrepresented or known to have no sources of income, and that these practices enabled it "to negotiate settlements with these persons on a greatly reduced basis and in amounts which were, in my opinion, grossly low and inadequate." A18 (Affidavit of Ron W. Ward, ¶¶ 5, 6). Consequently, the investigator stated, it is not uncommon for attorneys to advance funds or guarantee loans in order to provide claimants with living expenses while awaiting resolution of their claims. *Id.* ¶ 4.

To aid clients who faced financial hardship, Mr. Leizerman and Mr. McGill assisted them in obtaining loans from a local bank by signing as co-makers of the loans. The loan notes were drawn in amounts of a few thousand dollars, rolled over periodically and renewed, with additions, if necessary, on a ninety-day basis. A9, A11; Hearing Tr. at 31-35. In each instance, the attorneys made clear that the clients were ultimately responsible for repaying the loan. A12, A13. The loan proceeds were

used only for medical and/or living expenses during pending litigation or settlement negotiations. A11-12. In addition, the possibility of obtaining loans was never used as a basis for advertising or solicitation, but was only discussed with existing clients who raised the need for such assistance after the attorney-client relationship had been established. A11, A13.

The loans allowed clients to endure pretrial delays and obtain judgments or settlements that were more favorable than the offers made by the defendants when the claimants were facing financial difficulties. *See, e.g.*, A19-20: Hearing Tr. at 99-100, 193-94. The clients who obtained these loans attested that they were satisfied with the handling of their cases, and had no complaints concerning the loan process or the representation they received. A12, 13.

Petitioner deliberately limited the clients that he assisted in obtaining loans to clients pursuing claims under the FELA. A8-9. Consequently, his conduct (as distinguished from Mr. McGill's) only resulted in advancing funds to FELA claimants. A2, A11.[1] All the cases at issue in the disciplinary proceeding for which petitioner was responsible were filed in the federal courts in Ohio, which have held that it is permissible for lawyers to guarantee loans for living expenses of clients who need financial assistance to withstand delays in litigation. Hearing Tr. at 156. Indeed, the Ohio and federal court precedents on this issue are in direct conflict. In 1964 the

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[1] Nine of the twelve loans involved in the disciplinary proceeding were for FELA claimants and were procured by both attorneys; the other three loans for non-FELA claims were procured by Mr. McGill alone. The Board found that, although Mr. Leizerman signed notes for the non-FELA cases after funds had been disbursed in order to protect the integrity of other FELA loans, his actions did not result in advancing funds to non-FELA clients. A11, A8-9.

Supreme Court of Ohio, interpreting the Canons of Professional Ethics adopted by Ohio at that time, suspended an attorney because he advanced small sums of money for living expenses to two recently widowed clients pursuing claims under the FELA for the death of their husbands. *Mahoning County Bar Ass'n v. Ruffalo*, 176 Ohio St. 263, 199 N.E.2d 396 (1964), *cert. denied*, 379 U.S. 931 (1964). The district court for the Northern District of Ohio then reviewed this decision, but refused to impose discipline against Mr. Ruffalo for this same conduct because it concluded that advancing funds to permit clients to withstand delays in litigation under FELA was not unethical or improper. *In re Ruffalo*, 249 F. Supp. 432 (N.D. Ohio 1965). The court expressly rejected the Ohio Supreme Court's views, and determined that prohibiting advances to assist a needy client in meeting living expenses "is not in consonance with this Court's concept of justice or the underlying purposes of the Canons of Professional Ethics," because, among other things, banning such advances would undermine the rights of plaintiffs in FELA litigation. *Id.* at 440-45.[2] In the disciplinary proceeding below, petitioner established that the federal district court for the Northern District of Ohio still follows the views announced in *In re Ruffalo*, and had specifically approved petitioner's request for permission to advance funds for living expenses to a FELA claimant who need the funds because of litigation delays. *See* A24-26.

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[2] The Sixth Circuit, in a separate disciplinary proceeding, declined to address whether the loans made by Ruffalo constituted a valid basis for disbarment, but relied on the Ohio disciplinary board's findings to disbar Ruffalo on alternative grounds. This Court reversed the Sixth Circuit's decision, finding that Ruffalo had been denied due process in the state board's hearing on the disciplinary charges. *In re Ruffalo*, 390 U.S. 544 (1968), *reversing*, 370 F.2d 447 (1966).

B. *Findings and Decisions of the Board of Grievances and Discipline and the Supreme Court of Ohio.*

In October 18, 1990, the Toledo Bar Association filed complaints against petitioner and Mr. McGill, alleging that the loans described above violated DR 5-103(B) of the Ohio Code of Professional Responsibility, which is identical to the same provision in the American Bar Association ("ABA") Model Code of Professional Responsibility. *See* p. 1, *supra*. The stated purpose of this Rule is to prevent attorneys from obtaining a financial interest in the outcome of litigation that would interfere with the exercise of the attorney's independent professional judgment on behalf of a client.[3] At times, the Rule is also defended on the ground that it prevents attorneys from using the promise of advances to solicit clients.[4]

Petitioner argued that DR 5-103(B) should be construed narrowly so that it did not prohibit guaranteeing loans for existing clients who needed financial assistance to obtain their day in court, because applying the rule to such situations did not serve the interests the Code was intended to promote and, if so applied, (i) Ohio's authority to apply the rule to loans made to assist FELA claimants was preempted by the federal court's approval of such loans; and (ii) the rule would be unconstitutional under

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[3] *See* Ohio Code of Professional Responsibility, EC (Ethical Consideration) 5-8 ("A financial interest in the outcome of litigation also results if monetary advances are made by the lawyer to his client."); C. Wolfram, *Modern Legal Ethics*, § 9.2.3 at 507 (1986).

[4] *See* A6, (Opinion of Holmes, J., dissenting) ("The basic purpose underlying the Disciplinary Rule addressed in this matter is to curtail or regulate the unprofessional solicitation of clients through the advancement of monies, or the direct assistance in attorney monies, during the course of litigation."); C. Wolfram, *supra*, § 9.2.3 at 507.

the First Amendment, and the Due Process and Equal Protection clauses of the Fourteenth Amendments.[5]

In support of his constitutional challenges, petitioner presented testimony from the former Minnesota Director of Lawyers Professional Responsibility, Michael J. Hoover, who stated that experience in Minnesota shows that applying the Rule broadly to reach loans to indigent clients who would otherwise be forced to accept inadequate settlements is not necessary to prevent unethical conduct. Mr. Hoover testified that Minnesota's version of DR 5-103(B) was changed in 1985 to explicitly permit such loans, and that adding this language to the Rule did not result in any problems in protecting the public from unprofessional behavior. *See* A12; Hearing Tr. at 240, 245.

Moreover, Mr. Hoover noted that lawyers are permitted to advance funds and acquire financial interests in the outcome of the litigation for other purposes. Under DR 5-103 of the Ohio Code, and the professional codes of Minnesota and other jurisdictions, attorneys are permitted to acquire an interest in the outcome of civil litigation (i) by contracting for a reasonable contingency fee; and (ii) by making advances or guaranteeing loans for litigation expenses for clients. *See* Ohio Code of Prof. Responsibility, DR 5-103; Minn. Rules of Prof. Conduct, Rule 1.8. The conflict of interest concerns raised by these permitted financial interests, Mr. Hoover testified, were not different from those presented by lawyers guaranteeing loans for living expenses. Hearing Tr. at 240-45. The Bar Association presented no counter-evidence to show any state interest in prohibiting attorneys from guaranteeing loans to impecunious clients, nor did it offer evidence of any

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[5] *See Louisiana State Bar Ass'n v. Edwins*, 329 So. 2d 437, 446 (La. 1976) (interpreting identical provision of Louisiana Professional Code to permit loans to indigent clients because applying rule would not promote purpose of the Code and would raise constitutional problems).

state interest in distinguishing loans for living expenses, which are prohibited, from loans for litigation expenses, contingency fees or other financial interests that lawyers are permitted to acquire under the Ohio rules.

Under Ohio procedures, disciplinary complaints are heard by the Board of Commissioners on Grievances and Discipline, which, in turn, makes a recommendation to the Supreme Court of Ohio.[6] A Hearing Panel of the Board heard all the evidence and made the following factual findings, which were adopted by the full Board of Commissioners on Grievances and Discipline:

> The testimony is uncontroverted that all the loans were given only to already existing clients who needed the money to withstand delays in litigation. There is no evidence of improper solicitation. Once it was determined loans were needed, they were facilitated openly from a regulated financial institution. These loans were made only after the clients personally convinced the respondents that the loans were needed. There is no evidence of any interference with Respondents' independent professional judgment.

A11-12 (record citations omitted), A3.

Although the Board found that none of the interests promoted by the Disciplinary Rule was implicated since there was no advertising or solicitation involved, and "no evidence that the independent professional judgment of either Respondent was compromised in any way," the Board concluded that the conduct was a clear violation of DR 5-103(B). A13-14. It recommended that petitioner and Mr. McGill be disciplined with a six-month suspen-

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[6] Ohio Gov. Bar. R. V, §§ 2, 6, 8; *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 654 (1985).

sion, to be stayed on the condition that there be no further violations of DR 5-103(B). A14.

Petitioner presented his federal claims to the Board, but the Board concluded that constitutional challenges were "beyond its jurisdiction to consider." A13. Petitioner's federal challenges under the First and Fourteenth Amendment and the Supremacy Clause (and other arguments) were then presented to the Ohio Supreme Court. *See* A30-A34. In a *per curiam* opinion, the Court affirmed the Board's conclusion that financial assistance to needy clients, even when made to withstand delays in FELA litigation, are prohibited under Ohio's Code of Professional Conduct. The Court did not discuss the federal claims. Although it noted that petitioner's arguments against DR 5-103(B) "warrant some review," the Court entered judgment against petitioner based on the Board's findings, and reduced the Board's recommended penalty to a public reprimand. *See* A4-5. Two judges dissented on the basis that the recommended penalty should not have been reduced. A5-6.[7]

On September 23, 1992, respondent filed a motion for reconsideration based on the Ohio Supreme Court's failure to discuss his preemption and other constitutional challenges. A35. The motion was denied, without opinion, on October 28, 1992. A15.

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[7] During the course of the disciplinary proceedings, on December 11, 1991, a petition was submitted to the Ohio Supreme Court to amend DR 5-103(B) to explicitly recognize an exception for loans needed to withstand delays in litigation, as has been done in Minnesota and other jurisdictions. *See* A27, A13, A4 n.1. No amendment of the Rule has been adopted, however.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Most states now have disciplinary rules that, like the Ohio rule at issue here, prohibit lawyers from providing financial assistance to clients they represent in litigation, with the exception of advances for litigation expenses. When applied to forbid any assistance for medical and living expenses needed to survive delays in litigation, as Ohio did here, these rules deny personal injury claimants, including FELA claimants, the assistance needed to obtain a hearing to vindicate valid claims. This Court should grant certiorari to review two sets of important constitutional issues presented by the Ohio Supreme Court's decision in this case.

1. The decision below raises important constitutional issues under the Supremacy Clause because it involves the use of state disciplinary proceedings to discipline attorneys representing claimants under a *federal* statute in *federal* court for conduct that the federal courts have explicitly approved because it fosters the vindication of federal rights. The FELA and the standards of professional conduct in federal court proceedings are governed by federal law. But in the decision below Ohio has encroached on federal rights and on the authority of federal courts by prohibiting attorneys from guaranteeing loans for FELA claimants — despite the fact that federal courts have declared that such loans are ethical precisely because they are often needed to preserve the claimants' right to just resolution of their FELA claims. Because virtually all members of the federal bar are subject to state disciplinary rules that may be inconsistent with federal law, this use of state authority over attorneys to impose a prohibition that is contrary to federal law raises important issues concerning the ability of states to trespass on the federal courts' authority over attorney conduct, and to impair the ability to obtain relief under the FELA.

2. The decision below also raises important constitutional questions under this Court's decisions concerning the rights of access to the courts under the First Amendment, and the Due Process and the Equal Protection Clauses of the Fourteenth Amendment. The use of state disciplinary rules in Ohio, and other states, to prohibit lawyers from providing financial assistance to indigent clients who will otherwise be forced to abandon or accept an inadequate settlement of their claims because of financial hardship caused by court delays is inconsistent with the decisions of this Court holding that states cannot enforce professional conduct or other rules that impose unjustified or arbitrary barriers on access to the courts. Review by this Court is warranted because, by prohibiting attorneys from guaranteeing loans such as those involved here, states may deprive a wide range of personal injury claimants of the financial assistance needed to survive prolonged litigation and resolve their claims on the merits, without serving any legitimate state interest in preventing improper solicitation or conflicts of interest.

REASONS FOR GRANTING THE WRIT

This Court has recognized that defendants can, and often do, use the delays inherent in litigation to force claimants to accept quick and cheap settlements, particularly in FELA actions. *See Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1, 3-4 (1964). " 'The importance of financial aid from his lawyer to an injured workman may spell the difference between injustice and justice.' " *In re Ruffalo*, 249 F. Supp. at 444 (quoting *Mahoning County Bar Ass'n v. Ruffalo*, 176 Ohio St. 263, 199 N.E.2d 396, 403 (Herbert, J., dissenting)). Court delays can slow final resolution of a claim for years, and railroads and other defendants can wait-out indigent claimants until they are forced to abandon their claims altogether, or settle them for a small percentage of their reasonable value. " 'In short, the powerful can close the

doors of the courts to the weak by reason of the lack of finances of the claimant.' " *Id.*

This barrier to just resolution of FELA claims is strengthened when state disciplinary rules are applied, as Ohio has done here, to prohibit attorneys from guaranteeing loans for medical and living expenses that clients need to survive prolonged litigation and resolve their claims based on the merits. The problem is not limited to Ohio, however. Most states now have rules that prohibit attorneys from providing financial assistance to clients they represent in litigation, with an exception only for litigation expenses. These rules are not only a vestige of the ancient prohibitions on champerty and maintenance, but are actually more restrictive than the common law. Prior to the ABA's adoption of the Model Code of Professional Responsibility in 1969, most cases recognized that it was not improper for attorneys to provide advances for living expenses to assist indigent clients "where without such aid [the client] would be unable to enforce a just claim."[8] But most jurisdictions have displaced the common law principles and canons with codes by adopting DR 5-103(B)

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[8] *People ex rel Chicago Bar Ass'n v. McCallum*, 341 Ill. 578, 173 N.E. 827, 831 (1930); *see generally* Annotation, 8 A.L.R. 3d 1155, 1158, 1176-77 (1966) (reviewing cases and summarizing general rule as permitting loans for living expenses where loans are not used for solicitation); Note, *Loans to Clients for Living Expenses*, 55 Cal. L. Rev. 1419, 1421-23 (1967) (cases prior to 1955 "favored loans for living expenses, recognizing that with them clients might withstand unjust settlement offers they would otherwise accept out of necessity"); Note, *Guaranteeing Loans to Clients Under Minnesota's Code of Professional Responsibility*, 66 Minn. L. Rev. 1091, 1093-99 (1982) (cases interpreting common law and Canons of Ethics adopted by the ABA in 1908 generally approved loans for living expenses). The principal pre-1969 authorities concluding that assistance for living expenses is flatly prohibited were ABA Formal Opinion No. 288 (Oct. 11, 1954), and the Ohio Supreme Court's decision in *Mahoning County Bar Ass'n v. Ruffalo*, *supra*.

of the ABA Model Code, Rule 1.8(e) of the 1983 ABA Model Rules of Professional Conduct, or comparable provisions, which contain no express exception for such loans.[9] Despite criticism that prohibiting all loans for

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[9] *See Waldman v. Waldman*, 118 A.D.2d 577, 499 N.Y.S.2d 185 (2d Dep't 1986) (language of DR 5-103(B) prohibits advances of money motivated solely by concern for client's financial plight that would have been proper under the former Canons of Ethics); C. Wolfram, *supra* § 9.2.3 at 508-509 & nn. 86-88 (pre-Code authority was divided, but most decisions under the Code hold assistance with living expenses is prohibited, no matter how needful the client); ALI, Restatement of the Law Governing Lawyers, Tent. Draft No. 4, § 48 at 227, 231 (April 10, 1991) ("Loans going beyond litigation expenses are barred in most jurisdictions").

All together, forty-five states have adopted rules against financial assistance that provide no explicit exemption for living or medical expenses. *See infra* note 10 (describing jurisdictions that have such exemptions). Many, like Ohio, have adopted the language of DR 5-103(B) of the Model Code of Professional Responsibility. *See supra* at 1. Over half the states have now adopted Model Rule 1.8(e), which provides:

> A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of a client.

The final draft version of Model Rule 1.8(e) contained language permitting advances of "reasonable and necessary medical and living expenses," *see* Final Draft of the Model Rules of Professional Conduct, 67 *ABA Journal* 12 (Spec. Supp., Oct., 1981), but it was amended to remove this language before final adoption. G. Hazard and W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct*, 274 (2d Ed. 1992 Supp.) Nevertheless, the Model Rule is more liberal than DR 5-103 because it does not require that the "client remains ultimately liable for [financial assistance with litigation] expenses." Thus, the attorney is permitted to finance litigation expenses without the assurance that they will be repaid by the client.

living expenses is unjustified and prejudices the rights of needy claimants, only a few jurisdictions have adopted rules that explicitly permit such assistance.[10]

The Ohio Supreme Court's decision in this case places the constitutional infirmities of rules that prohibit loan guarantees needed to withstand litigation delays in particularly sharp focus because (i) the decision is contrary to the Ohio federal courts' determination that such loans should be permitted, and (ii) the findings of fact below demonstrate that the ban does not serve any of the state interests behind the ethics rules. The only result of applying the state rule to bar the loan guarantees at issue in this proceeding is to prevent needy clients who have valid claims under the FELA from obtaining the financial assistance necessary to survive until they can have their claims heard in federal court. Thus, this rule falls within a familiar pattern of cases in which prophylactic disciplinary rules have been declared unconstitutional when applied in a manner that does not serve the interests behind the rule. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 644-45 (1985); *In re Primus*, 436

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[10] *See* A27, Minn. Rules of Professional Conduct, Rule 1.8(e)(3) (lawyer may guarantee loan needed to withstand delays in litigation); N.D. Rules of Prof. Conduct, Rule 1.8(e)(3) (same); A28, D.C. Rules of Prof. Conduct, Rule 1.8(d) (lawyer may provide financial assistance necessary to maintain litigation); Ala. Rules of Prof. Conduct, Rule 1.8(e)(3) (permitting emergency financial assistance); Texas Rules of Professional Conduct, Rule 1.8(d)(1) (permitting advances for reasonably necessary medical and living expenses); Cal. Rules of Professional Conduct, Rule 4-210(A)(2) (permitting loans to clients). Louisiana has recognized such an exception by narrowly interpreting DR 5-103(B) as not prohibiting loans to existing clients for necessary living expenses. *Louisiana State Bar Ass'n v. Edwins*, 329 So.2d at 446. Other jurisdictions, however, have concluded that such interpretations are foreclosed by the language of their code or rules. *See Waldman v. Waldman*, *supra*; *Committee on Professional Ethics v. Bitter*, 279 N.W.2d 521, 523 (Iowa 1979).

U.S. 412 (1978). Regardless of the general validity of the rule, it is unconstitutional when applied in a manner that serves no state interest, but " 'operates to deprive an individual of a protected right.' " *Little v. Streater*, 452 U.S. 1, 16 (1981) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)). The decision below should be reviewed by this Court because it infringes on both the rights protected by the FELA, and the constitutional rights of access to the courts protected by the First and Fourteenth Amendments.

I. OHIO'S APPLICATION OF ITS PROHIBITION ON LOAN GUARANTEES FOR LIVING EXPENSES TO LOANS FOR FEDERAL FELA CLAIMANTS, WHEN SUCH GUARANTEES HAVE BEEN APPROVED BY THE FEDERAL COURTS, PRESENTS AN IMPORTANT ISSUE UNDER THE SUPREMACY CLAUSE THAT SHOULD BE RESOLVED BY THIS COURT.

The FELA was enacted to create a federal right to compensation for injured railroad employees that would displace state "common-law rules that sometimes made recovery difficult or even impossible." *Brotherhood of Railroad Trainmen*, 377 U.S. at 3. In order to protect these federal rights, this Court has on several occasions granted certiorari to make clear that federal rights are not "defeated by the forms of local practice," *Brown v. Western Railway of Alabama*, 338 U.S. 294, 296 (1949), and underscore that "federal law governs cases under the [FELA]." *Dice v. Akron, Canton & Youngstown Railroad Company*, 342 U.S. 359, 361-62 (1952). In doing so, the Court has held that state procedural and pleading rules that impair the right of workers to vindicate their rights under the FELA are preempted by federal law, even when state courts are exercising concurrent FELA jurisdiction. *See Monessen Southwestern Railway Co. v. Morgan*, 486 U.S. 330, 335-36 (1988); *Norfolk and Western R. Co. v. Liepelt*, 444 U.S. 490, 493 (1980); *Brady v. Southern*

Railway Co., 320 U.S. 476 (1943); *Central Vermont Railway Co. v. White*, 238 U.S. 507 (1915).

In addition, this Court has made clear that the rules of professional conduct in federal courts are controlled by federal law, and not by state law. *In re Snyder*, 472 U.S. 634, 645 n.6 (1985); *In re Ruffalo*, 390 U.S. 544, 547 (1968). Efforts by states to exercise their disciplinary authority in a manner that conflicts with federal law and impairs the ability of attorneys to vindicate federal rights are preempted. *See Sperry v. Florida*, 373 U.S. 379 (1963) (state law against unauthorized practice of law preempted by federal law licensing patent attorneys). A state cannot hinder or obstruct "the right to perform the functions within the scope of the federal authority." *Id.* at 385.

The discipline imposed by the Supreme Court of Ohio's actions cannot be reconciled with either of these lines of authority. First, by applying a state disciplinary rule to FELA cases, the Ohio Supreme Court has imposed standards that are inconsistent with the standards of conduct established by the federal courts. The discipline imposed here is contrary to the decision of the federal District Court for the Northern District of Ohio specifically rejecting the Ohio Supreme Court's view and concluding that it would be unjust to prohibit attorneys from guaranteeing such loans for FELA claimants. *In re Ruffalo*, 249 F. Supp. at 442-45. It is also inconsistent with the evidence showing that the federal court in Ohio still endorses such assistance. A26.[11] The implications of the

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[11] The Ohio federal courts are not alone. *See* N.D. Ill. Local Rules, Gen. R. 39 (providing that, for good cause shown, court may approve advances by attorney to client for living costs); *Jahn v. Champagne Lumber Co.*, 157 F. 407, 418 (W.D. Wisc. 1908) ("It has never been held violative of law or public policy to give financial aid

(continued...)

use of state disciplinary authority to interfere with the representation of clients in federal court is not limited to the FELA, however. Virtually all attorneys practicing in federal court are members of state bars that may have disciplinary rules that are contrary to federal law. Under the Supremacy Clause, states cannot be permitted to punish attorneys litigating in federal court for taking actions that the federal courts have authorized.

Second, by prohibiting attorneys from representing FELA claimants in a manner that has been expressly approved by the federal courts, the Ohio Rule specifically frustrates the ability of FELA claimants to obtain the fair hearing of their claims under federal law. The Supremacy Clause prohibits states from obstructing federally protected rights to relief in this manner. *Cf. Brown v. Western Railway*, 338 U.S. at 296 (state pleading rule cannot be used to defeat rights protected by the FELA). For example, a state could not impose an ethics rule prohibiting attorneys bringing class actions in federal court from communicating with potential class members, because such a rule would be inconsistent with the policies behind the federal class action rule. *Cf. Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99-102 (1981). Likewise, a state could not frustrate the enforcement of federal legislation by prohibiting attorneys from entering into reasonable contingent fee arrangements, or forbidding advances for litigation expenses, where such practices are consistent with federal law and help to vindicate the federal rights at issue. *See County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1407, 1414-15 (E.D.N.Y. 1989) (DR 5-103(B) restrictions on advancing litigation expenses preempted insofar as they

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[11](...continued)
to a poor suitor who is prosecuting a meritorious cause of action. . . . The law does not tolerate the notion that a powerful defendant may force the abandonment of a suit whenever he is able to exhaust the slender means of a weak antagonist.")

are inconsistent with national policies that underlie class actions); *accord Rand v. Monsanto Co.*, 926 F.2d 596, 600-01 (7th Cir. 1991); *Baylson v. Disciplinary Board of the Supreme Court of Pennsylvania*, 764 F.Supp. 328, 348-49 (E.D. Pa. 1991).

The disciplinary rule at issue here is preempted for the same reason. The federal courts in Ohio have declared that guaranteeing loans for indigent FELA claims is ethical and assists in vindicating the rights created by Congress under the FELA. Enforcement of the state's contrary rule in cases involving assistance to FELA claimants undermines the rights created by Congress by denying claimants the assistance that they need to resolve their claims based on the merits, rather than financial desperation. Moreover, the existence of similar disciplinary rules in other jurisdictions prevents, or at least deters, such assistance to FELA claimants because of the threat that states may use their regulatory authority over attorneys to prevent assistance to claimants in FELA cases, or similar actions under federal law.[12]

Accordingly, the decision below undermines both the authority of the federal courts and the rights protected by the FELA. This Court should grant certiorari to remove the inconsistency between the state and federal

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[12] This Court's decision in *Brotherhood of Railroad Trainmen*, rested on the First Amendment rather interference with the federal FELA rights in violation of the Supremacy Clause. *See United Mine Workers*, 389 U.S. 217, 224 n.9 (1967) (decisions in *Button* and *Brotherhood of Railroad Trainmen* did not rest on state interference with federal programs, so they are equally applicable to litigation involving rights created by state law). Nevertheless, the Court did note that "[a] State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest." *Brotherhood of Railroad Trainmen*, 377 U.S. at 7.

ethical standards, and declare that federal law controls whether or not attorneys can guarantee loans needed for FELA claimants to withstand delays in litigation.

II. STATE RULES PROHIBITING ATTORNEYS FROM GUARANTEEING LOANS FOR CLIENTS WHO NEED FINANCIAL ASSISTANCE TO WITHSTAND LITIGATION DELAYS IMPAIR RIGHTS OF ACCESS TO THE COURTS PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS, AND PRESENT IMPORTANT CONSTITUTIONAL ISSUES THAT SHOULD BE SETTLED BY THIS COURT.

Prohibiting loans for living expenses of clients who, without such financial assistance, will be unable to have their day in court also presents important constitutional issues under the decisions of this Court concerning the rights protected by the First Amendment, and by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Lower courts have repeatedly questioned the constitutionality of applying these rules to impede the ability of indigent personal injury claimants to pursue their claims in Court. *See Louisiana State Bar Ass'n v. Edwins*, 329 So.2d 437, 446 (La. 1976); *In re Teichner*, 75 Ill. 2d 88, 387 N.E.2d 265, 271-72 (1979). These important issues should be resolved by this Court.

This Court's decisions have declared that the First Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment establish closely related and, to some extent, overlapping restrictions on states' abilities to impose prohibitions that handicap access to the courts. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 n.5 (1982). Ohio's ban on assisting needy clients to withstand delays in litigation by guaranteeing bank loans fails to satisfy the tests established by the Court under each of these provisions.

A. The First Amendment. This Court has recognized that litigation, and assistance to litigants, is protected by the First Amendment. *NAACP v. Button*, 371 U.S. 415, 429-30 (1963); *accord In re Primus*, 436 U.S. at 431-32. Moreover, the Court has specifically held that efforts to assist injured workers in pursuing FELA claims are protected by the First Amendment, *Brotherhood of Railroad Trainmen*, 377 U.S. 1 (Virginia prohibition on union plan for advising injured workers to obtain representation of union-approved attorneys for FELA claims violates First Amendment). The First Amendment interests recognized in *Button* are equally applicable to litigation "solely designed to compensate the victims of industrial accidents." *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 223 (1967).

These cases hold that state professional conduct rules that handicap the ability to provide assistance to litigants must be drawn "with narrow specificity." *Button* 371 U.S. at 433, 438. Prophylactic rules aimed at preventing maintenance of baseless litigation or conflicting interests may not be applied broadly unless the state demonstrates a "substantial regulatory interest, in the form of substantive evils flowing from the petitioner's activities, which can justify the broad prohibitions which it has imposed." *Id.* at 444; *accord United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. at 222-23; *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. at 7-8. Moreover, the state's interest must not be speculative or theoretical; the state bears the burden of making a "showing of a serious danger here of professionally reprehensible conflicts," to justify the rule. *Button*, 371 U.S. at 443; *accord Brotherhood of Railroad Trainmen*, 377 U.S. at 8. Thus, "the burden is on the State to present a substantial government interest justifying the restriction . . . and to demonstrate that the restriction vindicates that interest through the least restrictive means." *Zauderer*, 571 U.S. at 647.

This Court's holdings in *Button* and *Brotherhood of Railroad Trainmen* were summarized in *United Mine Workers v. Illinois State Bar Ass'n*, which held that applying Illinois' rules against the unauthorized practice of law to prohibit a union from hiring a lawyer to handle workmen's compensation claims for its members violates the First and Fourteenth Amendments. The state prohibition on solicitation struck down in *Button* violated the First Amendment, the Court said, because "the dangers of baseless litigation and conflicting interests" it purported to prevent were "far too speculative to justify the broad remedy invoked by the State." *Id.* at 223. Likewise, in *Brotherhood of Railroad Trainmen v. Virginia*, Virginia's prohibition on a union plan for advising injured workers to obtain representation by union-approved attorneys to assist them in pursuing FELA claims was found unconstitutional because there was only "a theoretical possibility" of conflict of interests, and this "distant possibility of harm could not justify" the prohibition on the union's efforts to assure that "each injured member would be justly compensated for his injuries." *Id.* In *United Mine Workers* the state's prohibition was struck down because "there was absolutely no indication that the theoretically imaginable divergence between the interests of the union and member arose in the context of the particular lawsuit," *id.* at 224, and the state failed to produce any evidence that permitting assistance to injured workers would result in any harm to the public. *Id.* at 225.

Subsequent cases have reaffirmed these principles in concluding that certain prophylactic disciplinary rules of Ohio and other states are unconstitutional under the First Amendment. *See, e.g., Gentile v. State Bar of Nevada*, ___ U.S. ___ (1991); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 472-78 (1988); *Zauderer*, 471 U.S. at 639-48; *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). These cases firmly establish that state disciplinary rules that infringe on First Amendment rights cannot be applied indiscriminately

to circumstances where the conflicts of interest or other substantive evil the rules purport to regulate are absent, or are merely hypothetical. *See In re R.J.M.*, 455 U.S. 191, 207 (1982); *In re Primus*, 436 U.S. at 436.

Ohio's application of its prohibition on financial assistance to clients to the conduct at issue here cannot withstand scrutiny under the test in *Button* and its progeny. The decision below plainly frustrates access to the courts. The state acknowledged that the loan guarantees were given only to clients who demonstrated a need for financial assistance in order to continue to pursue their claims during the delays in litigation. Thus, prohibiting such guarantees strengthens defendants' ability to force claimants to accept settlements based on financial hardship, and prevents indigent clients from pursuing valid claims. By barring the financial assistance necessary for claimants to survive court delays and resolve their claims on the merits, the rule infringes on rights protected by the First Amendment.

The state's own findings establish that there is no countervailing state interest to justify this infringement. The Board acknowledged that the loans were made through an independent financial institution, that there was no improper solicitation, and that there was no conflict of interest involved. Indeed, the state was unable to identify any state interest served by prohibiting loans for living expenses needed to allow claimants to survive court delays and obtain a hearing on their claims.[13] While the rule reduces litigation by limiting the ability of impecunious clients to pursue their claims through pretrial

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[13] *See also In re Ratner*, 194 Kan. 362, 399 P.2d 865, 874 (1965) (where there is no improper solicitation, loaning money to client so he could live until case was tried rather than being forced to settle does not present any of the evils addressed by rules against maintenance).

delays, this does not reflect a legitimate state interest but, to the contrary, underscores the constitutional infirmities of the rule. This Court has made clear that "we cannot endorse the proposition that a lawsuit, as such, is an evil. . . . That our citizens have access to their civil courts is not an evil to be regretted; rather it is an attribute of our system of justice in which we ought to take pride." *Zauderer*, 471 U.S. at 643. Thus, by prohibiting financial assistance needed to permit litigants to have their day in court, the state unconstitutionally violates rights protected by the First Amendment.

B. Due Process. A client's cause of action under the FELA is plainly "a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. at 428-31; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The Due Process Clause protects access to the courts to obtain a hearing on such claims, and requires that state laws that deprive litigants of that access be justified by an overriding state interest. "[H]aving made access to the courts an entitlement or a necessity, the State may not deprive someone of that access unless the balance of state and private interests favors the government scheme." *Logan* 455 U.S. at 430 n. 5; *see also Little v. Streater*, 452 U.S. at 13-16; *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976) (due process requires balancing private interests, and risk of erroneous deprivation, against government's interests); *Boddie v. Connecticut*, 401 U.S. at 377.

Ohio's prohibition on guaranteeing loans for living expenses to clients who need financial assistance in order to withstand delays in litigation cannot withstand scrutiny under this balancing test. The private interests affected by the prohibition are substantial. The prohibition on obtaining assistance for living expenses not only burdens, but

may deprive, indigent claimants of their right to obtain a hearing on their claims:

> If an impoverished person is unable to secure subsistence from some source during disability, he may be deprived of the only effective means by which he can wait out the necessary delays that result from litigation to enforce his cause of action. He may, for reasons of economic necessity and physical need, be forced to settle his claim for an inadequate amount.

Louisiana State Bar Ass'n v. Edwins, 329 So.2d at 446.

Indeed, the impact of the rule is particularly acute in personal injury claims, like the FELA claims at issue here, where the claimant's need for assistance and the claim of entitlement that has been delayed are directly linked. In such actions, the claimant alleges that it is the defendants' tortious conduct that resulted in the injuries that give rise to his or her medical expenses and loss of earnings — but, without financial assistance, the claimant will be unable to survive the delays necessary to obtain a hearing on his or her entitlement to compensation for these very same losses. This Court has recognized that delays in resolving a claim of entitlement to funds that are needed for the claimant's support raise special constitutional concerns. *See Goldberg v. Kelley*, 397 U.S. 254, 264-65 (1970) (due process requires pre-termination hearing where claim is for benefits that provide essential means of support). The prohibition on financial assistance imposed by Ohio not only ignores this problem, but assures that defendants that are allegedly responsible for the claimants' hardship also have every incentive and opportunity to use litigation delays to place even more economic pressure on injured FELA claimants in order to deprive them of their day in court. *See* C. Wolfram, *supra* § 9.2.3 at 509.

On the other hand, no countervailing substantial state interest is advanced by applying this prohibition to the type of loans prohibited by the Ohio Supreme Court here. Narrower rules, drawn to recognize that it is permissible to guarantee a loan that "is needed to withstand delay in litigation that otherwise might unjustly induce the client to settle or dismiss a case because of financial hardship rather than on the merits," adequately protect the state's interest in preventing unethical conduct. ALI, Tentative Draft No. 4, *Restatement of the Law Governing Lawyers* § 48(2)(b), pp. 224-25, 227-28; *see* A27-29; *supra* note 10 (describing rules of other jurisdictions permitting loans for living expenses).

In the proceedings below, the Toledo Bar Association asserted that the prohibition raised no due process concerns by relying on *United States v. Kras*, 409 U.S. 434 (1973), and *Walters v. National Association of Radiation Survivors*, 473 U.S. 305 (1985). Those decisions are plainly inapposite. In *Kras* the Court concluded that there was no due process violation presented by conditioning discharge of debts in voluntary bankruptcy on the payment of filing fees because bankruptcy was not a fundamental right. This case, however, involves denial of the right to a hearing on a property right claim under FELA — a fundamental right protected by the Due Process Clause. In *Walters*, the Court upheld a limitation on attorneys fees because the administrative hearings provided to claimants were designed to be informal, nonadversarial, and favor the claimant. 473 U.S. at 323-24, 333-34. There was no contention that the claimants were deprived of their right to a hearing, only that they were effectively denied the ability to retain counsel. In contrast, the only hearing FELA claimants may obtain is a formal, adversarial hearing in court, and the claimants who cannot survive

court delays without financial assistance are wholly deprived of *any* hearing.[14]

C. Equal Protection. The Equal Protection Clause requires that state rules drawing distinctions that impose particular burdens on the right to be heard "must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi v. Yeager*, 384 U.S. 305, 310-11 (1966). Accordingly, this Court has held that state rules that limit the rights of particular categories of claimants by creating distinctions that are not rationally related to legitimate governmental objectives are unconstitutional under the Equal Protection Clause. *Logan*, 455 U.S. at 439 (Blackmun, J., concurring); *id.* at 444 (Powell, J., concurring); *see also Lindsey v. Normet*, 405 U.S. 56 (1972) (special requirement that defendants in summary ejectment proceedings post double bond to appeal violates equal protection).

Ohio's disciplinary rules violate the Equal Protection principles established in these cases by flatly prohibiting loans for medical and living expenses, while permitting attorneys to acquire interests in the outcome of the litigation through other means. The different treatment afforded various financial interests under the Ohio Rules is not "reasonably tailored to achieve" any state interest. *Lindsey v. Normet*, 405 U.S. at 78-79. The state permits lawyers to enter into agreements for contingent fees and advance costs for litigation expenses because

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[14] The decision in *Ortwein v. Schwab*, 410 U.S. 656 (1973), is distinguishable for the same reason. In *Ortwein* this Court held that a $25 filing fee to appeal decisions rendered after a state administrative hearing did not violate the due process clause because the claimants were afforded an administrative hearing that satisfied the requirements of due process. No such administrative hearing is available here. *See Little v. Streater*, 452 U.S. at 16 n.12 (where interest is constitutionally significant and no alternative forum exists, case is comparable to *Boddie* rather than to *Kras* and *Ortwein*).

these practices "may be the only way a client can enforce his cause of action."[15] But the state arbitrarily forbids all loans for medical or living expenses — even though such advances may be equally necessary for clients to enforce their rights.

This arbitrary distinction leads to irrational results. Under the Ohio rules, attorneys can advance funds to pay a physician to perform a medical evaluation of a client's injuries in preparation for trial, but cannot guarantee a loan to pay for the treatment of those same injuries — even when the treatment is necessary to mitigate the harm from the injury. In addition, loans for medical and living expenses are prohibited regardless of the amount or circumstances, while advances for litigation costs are unlimited. Thus, the rules permit attorneys to make advances for litigation expenses that may result in their acquiring a substantial interest in the outcome of the claim, but prohibit any guarantees for living expenses — no matter how modest those expenses are in relation to the claim. These distinctions are not justified by any interest in preventing attorneys from acquiring a financial stake that would impair professional judgment, as such impairment depends upon the amount of the advances or interest, not the type of expenses needed to pursue the litigation.

Moreover, the burden imposed by the prohibition obviously falls only upon poor clients, and places a particular burden on claimants who are in need of financial assistance precisely because they have been injured, and their request for compensation has been delayed in the courts. Such claimants, because they are unable to obtain financial assistance, may be foreclosed from pursuing their claim for the loss wages and injuries that give rise to their financial distress "no matter how

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[15] Ohio Code of Professional Responsibility, EC 5-7, 5-8.

meritorious their case may be." *Lindsey v. Normet*, 405 U.S. at 79; *cf. Goldberg v. Kelley*, 397 U.S. at 264-65. Thus, the different treatment afforded to living and medical expenses, litigation expenses, and contingency fees, is not rationally related to any legitimate governmental purpose, and merely serves to impair the rights of needy clients to pursue legitimate claims that they are entitled to compensation to cover their living and medical expenses.

For all these reasons, the application of state professional codes to prohibit loans for living expenses in order to withstand delays in litigation, as Ohio has done here, presents important constitutional issues that should be resolved by this Court.

CONCLUSION

The Court should issue a writ of certiorari to review the federal constitutional challenges to the Supreme Court of Ohio's application of DR 5-103(B) to prohibit loans for medical and living expenses needed in order for FELA claimants to withstand delays in litigation.

Respectfully submitted,

Michael E. Tankersley
(*Counsel of Record*)
David C. Vladeck
Alan B. Morrison
Public Citizen
Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 833-3000

Mark H. Aultman
Charles W. Kettlewell
150 East Wilson Bridge Road
Suite 200
Worthington, Ohio 43085
(614) 436-2750

January 26, 1993

Counsel for Petitioner

92-1266

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(2)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

E. J. LEIZERMAN

Petitioner,

v.

TOLEDO BAR ASSOCIATION

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Michael E. Tankersley
(*Counsel of Record*)
Alan B. Morrison
Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 833-3000

Mark H. Aultman
Charles W. Kettlewell
150 E. Wilson Bridge Road
Suite 200
Worthington, Ohio 43085
(614) 436-2750

Counsel for Petitioner

January 26, 1993

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APPENDIX

THE SUPREME COURT OF OHIO
1992 TERM

TOLEDO BAR ASSOCIATION v. McGILL

TOLEDO BAR ASSOCIATION v. LEIZERMAN

[*Cite as Toledo Bar Assn. v. McGill* (1992), 64 Ohio St.3d 669.]

Attorneys at law — Misconduct — Public reprimand — Guaranteeing financial assistance to clients while representing them in connection with contemplated or pending litigation.

(Nos. 92-425 and 92-426 — Submitted June 3, 1992 Decided September 16, 1992.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline of the Supreme Court, Nos. 90-56 and 90-58.

In separate complaints filed on October 18, 1990, relator, Toledo Bar Association, charged each of the respondents, Michael E. McGill (Attorney Registration No. 0001839) and E.J. Leizerman (Attorney Registration No. 0011300), with one count of violating DR 5-103(B). In the complaints filed by relator, it was alleged that respondents violated the rule by guaranteeing financial assistance to clients while representing them in connection with contemplated or pending litigation. Respondents answered the complaints by essentially admitting the allegations therein, but denying that such conduct violated DR 5-103(B). In addition, respondents asserted, *inter alia*, that the Disciplinary Rule was unconstitutional under the United States Constitution as applied to FELA ("Federal Employees Liability Act") cases. The matters were thereafter heard by a panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court on October 21, 1991.

In its findings of fact, the panel found that respondent, Michael E. McGill, was admitted to the practice of law in Ohio in 1974. Prior to obtaining his license, he had worked as an insurance adjuster. Since 1981, his practice has consisted primarily of plaintiffs' personal injury and FELA cases. He has no prior disciplinary violations and has fully cooperated with relator's investigation.

Respondent, E.J. Leizerman, was admitted to the practice of law in Ohio in 1976. He is also admitted to practice in Tennessee and Michigan. Like his partner McGill, Leizerman's primary area of practice is "virtually exclusively personal injury" and he estimated that a majority of his income is derived from FELA cases. He also has had no prior disciplinary violations and has fully cooperated with relator's investigation.

The panel further found that the respondents signed as co-makers on notes to Toledo Trust Company, a.k.a. Trustcorp Bank, Ohio, n.k.a. Society Bank, for the purpose of obtaining and guaranteeing loans of funds to clients who needed the funds in order to be able to withstand delays in litigation. The total amount of the notes due for the twelve clients named in the complaint as of November 15, 1989 was $93,800 in principal sum. It was stipulated with respect to these notes that in nine instances, involving federal FELA cases, the funds were procured by both attorneys. It was further stipulated that with respect to the three notes involving non-FELA (uninsured/underinsured motorist) cases, the funds were procured by McGill. All the notes were generally rolled over periodically and renewed, with additions if necessary, on a ninety-day basis. The testimony before the panel was uncontroverted that Leizerman signed notes in the non-FELA cases after funds had been disbursed to clients in order to protect the integrity of other (FELA) loans at the bank, and that his signing did not directly result in the advancing of money to those clients.

The testimony was also uncontroverted that all the loans were given only to already-existing clients who needed the money to withstand delays in litigation. There was no evidence of improper solicitation. Once it was determined loans were needed, they were facilitated openly from a recognized financial institution. These loans were made only after the clients personally convinced the respondents that the loans were needed. The panel also found that there was no evidence of any interference with respondents' independent professional judgment.

Affidavits from ten of the twelve clients involved were submitted with the stipulations. These affidavits attested to the facts that the monies borrowed were used for medical expenses, living expenses during pending litigation, or settlement negotiations; that each client understood his ultimate responsibility to repay his or her loan; and that each client was satisfied with the handling of his or her case by respondents.

The panel concluded that the constitutional challenge to the Disciplinary Rule in question was beyond its jurisdiction to consider, and that the conduct of respondents in guaranteeing loans to clients for expenses other than those of litigation violated DR 5-103(B), which provides as follows:

"While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses."

The panel therefore recommended to the board that each respondent receive a six-month suspension from the practice of law.

The board adopted the findings of fact and conclusions of law of the panel, but recommended that the six-month suspensions be stayed on condition that there are no further violations of DR 5-103(B).

Jonathan B. Cherry and *Peter L. Moran*, for relator.

Charles W. Kettlewell, for Michael E. McGill.

Charles W. Kettlewell and *Mark H. Aultman*, for E.J. Leizerman.

John J. Rossi and *James L. Cox, Jr.*, urging dismissal *pro hac vice*, for *amicus curiae* Academy of Rail Labor Attorneys.

Bob Gibbins and *Jeff White*, urging dismissal *pro hac vice*, for *amicus curiae* American Trial Lawyers Association.

Per Curiam. We agree that respondents committed the disciplinary violations found by the board. Nevertheless, we find some merit in respondents' assertion that DR 5-103(B) should perhaps be re-examined.[1] While the actions undertaken by respondents constituted violations of DR 5-103(B), the arguments raised by them, regarding this rule, warrant some review.

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[1] Other states have reexamined their disciplinary rule to consider the policy issues raised by DR 5-103. For example, Minnesota's version of DR 5-103 permits loans to clients if:

1. The client demonstrates substantial financial hardship; and

2. Without the loan the client would be forced to accept an inadequate settlement; and

3. The fact that the loan may be available is not advertised by the lawyer.

See Minnesota Rules of Professional Conduct, Rule 1.8(e)(3) (amended Sept. 1, 1985); see, also, District of Columbia Rules of Professional Conduct. Rule 1.8(d)(2) and Comment [5].

Accordingly, we reject the recommendation of the board, and order that both respondents be publicly reprimanded. Costs taxed to respondents.

Judgment accordingly.

SWEENEY, DOUGLAS H. BROWN, and BRYANT, JJ., concur.

WRIGHT, J., concurs in judgment only.

MOYER, C.J., and Holmes, J., dissent.

PEGGY BRYANT, J., of the Tenth Appellate District, sitting for RESNICK, J.

MOYER, C.J., dissenting. I dissent from the majority opinion and would adopt the recommendation of the Board of Commissioners on Grievances and Discipline that respondents be suspended for six months and that the suspension be stayed on the condition that they engage in no further conduct that constitutes a violation of DR 5-103(B).

The majority has sanctioned respondents with a public reprimand apparently because the majority believes that DR 5-103(B) "should perhaps be reexamined." While I do not disagree with the majority's conclusion in that respect, I do disagree with the majority's conclusion that because we believe that a Disciplinary Rule should be reviewed and perhaps be amended in the future, such possibility of reexamination constitutes a valid reason to reduce a sanction for past conduct that clearly violates the existing rule.

HOLMES, J., dissenting. Believing that there has been a serious violation of existing DR 5-103(B), I dissent from the majority opinion. The majority readily states that such violations occurred, but radically tempers the sanction on the basis that this court may in the future alter the applicable Disciplinary Rules. This seems to be a most unusual manner to administer our Disciplinary Rules.

The basic purpose underlying the Disciplinary Rule addressed in this matter is to curtail or regulate the unprofessional solicitation of clients through the advancement of monies, or the direct assistance in attorney money, during the course of litigation. This rule has been generally accepted as a reasonable rule to effect the intended result. Until properly reviewed and amended by rule of this court, DR 5-103(B), as interpreted by the Board of Commissioners on Grievances and Discipline here, should be followed.

Therefore, I would accept the recommendation of the board in this matter that each respondent receive a six-month suspension from the practice of law, but that the suspension be stayed on the condition that there are no further violations of DR 5-103(B).

MOYER, C.J., concurs in the foregoing dissenting opinion.

THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

No. 92-426, filed March 2, 1992

In re:	:	Case No. 90-56 AND Case No. 90-58
Complaint against: Michael E. McGill Atty. Registration #0001839	:	FINDINGS OF FACT, CONCLUSIONS OF
E.J. Leizerman Atty. Registration #0011300	:	LAW, AND RECOM-DATIONS OF THE
RESPONDENTS,	:	BOARD OF COMMIS-SIONERS ON
Toledo Bar Association,	:	GRIEVANCES AND DISCIPLINE OF
RELATOR.	:	THE SUPREME COURT OF OHIO

A hearing was held in regard to the above captioned cases on October 21, 1991 in the offices of the Toledo Bar Association, 311 North Superior Street, Toledo, Ohio.

Both Respondents were present at the hearing accompanied by their counsel, Charles W. Kettlewell. Relator, the Toledo Bar Association, was represented by Jonathan B. Cherry and Peter L. Moran.

The Hearing Panel consisted of Charles M. Diamond, Robin G. Weaver, and Frederick L. Oremus, who served as Chairman. No member of the Hearing Panel was from the district wherein the Complaints originated, nor had any member of the Panel served on the Probable Cause Panel which previously considered these cases.

The Complaints in these cases were filed on October 18, 1990, and Respondents were served with notice of the filing on November 9, 1990. Both Respondents filed Answers on November 26, 1990. Respondents filed Amended Answers on April 9, 1991. Hearings in these cases were originally scheduled in both April and May 1991, but were vacated due to scheduling conflicts.

The Complaints against both Respondents allege violations of DR 5-103(B) in that while representing clients in connection with contemplated or pending litigation, they advanced or guaranteed financial assistance to their clients.

At the Hearing, the parties submitted Stipulations complete with exhibits, the salient provisions of which are as follows:

2. On November 15, 1989, and for some time before and after that date, Respondents assisted certain of their clients whom they were representing in connection with contemplated or pending litigation, to obtain loans from Trustcorp Bank, Ohio, now known as Society Bank. Respondents obligated themselves as co-makers on at least twelve such loans.

3. As of November 15, 1989, Respondents were co-makers on twelve outstanding obligations totaling $93,800.00 in principal sum. A schedule of the name of the client and the principal amount of each such loan at that time is attached hereto as Joint Exhibit 1.

4. Of the twelve notes in issue, nine of them involve FELA cases and three involve uninsured/ underinsured motorist claims. Both attorneys assisted in procurement of loans for the nine FELA clients by co-signing ninety (90) day bank notes at Society Bank (fka Trustcorp). Mr. McGill procured

funds for the three non-FELA clients. Mr. Leizerman did not procure funds for the three non-FELA clients, but did sign those three notes after the disbursements were made.

5. Relator does not have evidence to introduce which would indicate that either Respondent directly used the availability of loans or other financial assistance for purposes of soliciting clients, and has not charged Respondents with improper solicitation.

6. The notes attached hereto as Joint Composite Exhibit 2 are true and accurate copies of the notes executed by Respondents in connection with the loans. These notes were generally rolled over periodically and renewed on a ninety (90) day basis, with the interest due on each note either paid by the attorneys as a condition of the renewal or paid by the client from additional advances.

7. True and accurate copies of the fee contracts for the twelve clients in question are attached hereto as Joint Composite Exhibit 3.

8. Mr. McGill and Mr. Leizerman each maintain that his independent professional judgment in regard to these clients has not been interfered with in any manner.

9. Mr. McGill and Mr. Leizerman have consistently testified that it was always their belief, intent, and understanding that the money obtained by the notes was to be used by each respective client solely for the reasonable and necessary medical and living expenses of each client, and not for litigation expenses.

Joint Exhibit 1

TRUSTCORP BANK November 15, 1989

OUTSTANDING NOTES FOR LEIZERMAN AND McGILL

1.	Andrew Lodzinski	$ 2,000.00
2.	Richard Greenfield	21,500.00
3.	Verniece Skiles	7,000.00
4.	Andrew Washington	10,700.00
5.		
6.	Robert Krasniewski	12,500.00
7.	Larry Makula	8,000.00
8.	Robert Norton	5,000.00
9.	Paul Arnold	5,000.00
10.	Albert Lloyd	4,500.00
11.	Jerry Smith	10,000.00
12.	Gerald Maltman	2,100.00
13.	Walter Tippie	5,500.00
		$93,800.00

In addition to the Stipulations and Joint Exhibits, Relator presented the testimony of both Respondents as upon cross-examination. Respondents again testified during their case in chief; presented testimony from Michael J. Hoover, a Minnesota attorney, who had served as Minnesota Director of Lawyers Professional Responsibility from 1979 to 1985; and introduced letters and affidavits from two attorneys, an insurance adjuster and an orthopedic surgeon.

FINDINGS OF FACT

Respondent, Michael E. McGill, was admitted to practice in Ohio in 1974. Prior to obtaining his license he had worked as an insurance adjuster. Since 1981, his practice has consisted primarily of plaintiffs' personal injury and FELA (Federal Employees Liability Act) cases. He has no

prior disciplinary violations and fully cooperated with Relator's investigation.

Respondent, E. J. Leizerman, was admitted to practice in Ohio in 1976. He is also admitted in Tennessee and Michigan. Like his partner, McGill, his primary area of practice is personal injury and he estimated that 50-75% of his "income comes from FELA cases." He has had no prior disciplinary violations and fully cooperated with Relator's investigation.

The Respondents signed as co-makers of notes to Trustcorp Bank, nka, Society Bank, for the purpose of obtaining loans of funds to clients who needed the funds in order to be able to withstand delays in litigation (Tr., p. 51). The total amount of the notes due for the twelve clients named in the complaint as of November 15, 1989, was $93,800 (Stip. 3). It is stipulated with respect to these notes that in nine instances, involving federal FELA cases, the funds were procured by both attorneys. It is stipulated that with respect to the three notes involving non-FELA cases, the funds were procured by Mr. McGill (Stip. 4). All the notes were generally rolled over periodically and renewed, with additions if necessary, on a ninety-day basis (Stip. 6). The testimony is uncontroverted that Mr. Leizerman signed notes in the non-FELA cases after funds had been disbursed to clients in order to protect the integrity of other (FELA) loans at the bank, and that his signing did not result in the advancing of money to those clients (Tr., pps. 41, 150).

The testimony is uncontroverted that all the loans were given only to already existing clients who needed the money to withstand delays in litigation (Tr., p. 32). There is no evidence of improper solicitation. Once it was determined loans were needed, they were facilitated openly from a regulated financial institution (Tr. 31). These loans were made only after the clients personally convinced the Respondents that they were needed (Tr., p. 187-9). There

is no evidence of any interference with Respondents' independent professional judgments.

Affidavits from ten of the twelve clients involved were submitted with the Stipulations. These affidavits attested to the facts that the monies borrowed were used for medical and/or living expenses during pending litigation and/or settlement negotiations; that each client understood his ultimate responsibility to repay his or her loan; and that each client was satisfied with the handling of his case by Respondents.

Mr. Hoover testified that Minnesota had a similar disciplinary issue raised under its former DR 5-103. In 1985 the Minnesota Supreme Court changed its rule to permit loans made to clients if:

1. The client demonstrates substantial financial hardship; and
2. Without the loan the client would be forced to accept an inadequate settlement; and
3. The fact that the loan may be available is not advertised by the lawyer.

Respondents introduced a letter from Attorney Douglas Roberts, as well as affidavits from Attorney Mark Kitrick and a Toledo orthopedic surgeon, indicating a trend among health care creditors not to accept letters of protection. An affidavit of Ronald Moore, a retired railroad insurance claims agent, was introduced attesting to the fact that the railroad industry intentionally attempts to delay FELA cases in order to force injured employees to settle their claims.

CONCLUSIONS OF LAW

DR 5-103(B) provides as follows:

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not

> advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

Based upon the Stipulations, Exhibits and the testimony, the Panel concludes that the conduct of the Respondents, Michael E. McGill and E. J. Leizerman, in guaranteeing loans to clients for expenses other than those of litigation, violated DR 5-103(B).

Relator argues that in light of the grand extent of these loans (twelve loans totaling in excess of $93,000) as well as Respondents' flagrant disregard of DR 5-103(B) of which they both acknowledged awareness, that Respondents should each be suspended from the practice of law for one year.

Respondents advanced several Constitutional challenges to DR 5-103(B) which the Panel concluded were beyond its jurisdiction to consider. Additionally, Respondents have submitted a request to the Ohio Supreme Court to amend DR 5-103(B) consistent with the Minnesota experience. The Panel is advised that the Ohio Supreme Court has not yet acted on Respondents' request. Finally, Respondents argued that if a violation were found, the appropriate sanction would be a public reprimand.

In the instant cases, Respondents guaranteed loans for living and medical expenses of needy clients after representation had begun. There was no advertising or solicitation. Clients remained ultimately responsible for the loans. While no clients were harmed and there was no evidence that the independent professional judgment of either Respondent was compromised in any way, there was a clear, intentional violation of the Disciplinary Rule for

which the Panel recommends that the Respondents receive a six-month suspension.

RECOMMENDATION

Pursuant to Gov. Bar R. V(18), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on February 14, 1992. The Board adopted the Findings of Fact and Conclusions of Law of the Panel. The Board voted to impose a six month suspension on the Respondents, Michael E. McGill and E. J. Leizerman, but that the suspension should be stayed on condition that there are no further violations of DR 5-103(B). This sanction will deter knowing violations of the Code of Professional Responsibility but not harshly punish the Respondents if future violations do not occur. The Board further recommends that the costs of these proceedings be taxed to the Respondent in any disciplinary order entered, so that execution may issue.

Pursuant to the order of the Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendations as those of the Board.

/s/Jonathan W. Marshall
JONATHAN W. MARSHALL, Secretary
Board of Commissioners on
Grievances and Discipline of
The Supreme Court of Ohio

THE SUPREME COURT OF OHIO
1992 TERM

	To wit :	October 28, 1992
Toledo Bar Association, Relator,	:	Case No. 92-426
v.	:	**REHEARING ENTRY**
E. J. Leizerman, Respondent.	:	

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment of the Constitution of the United States provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article VI of the Constitution of the United States provides, in relevant part:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

State of Ohio)
) ss
County of Lucas)

AFFIDAVIT

September 1, 1990

Now comes Ron W. Ward, a resident of the City of Toledo, Lucas County, Ohio and after first being duly sworn according to law, swears and avers as follows:

1. I was formerly employed by Consolidated Rail Corporation (Conrail), a railroad company engaged in interstate commerce, in the capacity of Claims Agent in Toledo, Lucas County, Ohio.

2. As part of my duties and responsibilities in connection with the aforesaid employment, I investigated, evaluated, negotiated, adjusted and/or litigated many hundreds of claims by employees and other persons making claims or demands for personal injuries against Conrail both within and outside of the State of Ohio.

3. I was authorized by Conrail to advance sums of money to persons making claims against Conrail to provide for their living expenses during the pendency of their claims. I did, in fact, arrange for hundreds of thousands of dollars of said advances; however, once a person retained legal counsel, all such advances ceased in accordance with the policy of Conrail.

4. I negotiated cases with attorneys both within and outside of the State of Ohio and have learned from these attorneys and their clients of the custom and practice of attorneys advancing funds or guaranteeing loans for the purpose of providing for living expenses and sustenance of said clients during the pendency of their claims. As a result, I have learned over the years that this was a very

common custom and practice and it was common knowledge on the railroad that attorneys advanced money and/or guaranteed bank loans for clients.

5. As part of my training and direction from Conrail, I was instructed to and frequently and purposely delayed the resolution and settlement of cases, particularly with respect to unrepresented persons and/or persons known to me to have no sources of income.

6. It was railroad policy to investigate the financial and living conditions of claimants and I was instructed and encouraged to withhold settlement authority and offers from persons known to be destitute. Frequently, I was able to negotiate settlements with these persons on a greatly reduced basis and in amounts which were, in my opinion, grossly low and inadequate.

7. That I aver and provide all of the information contained herein based upon actual, first hand knowledge and information.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Ron W. Ward

Sworn to and subscribed by Ron W. Ward, a person known to me, who appeared and affixed his signature hereinabove in my presence this 1st day September, 1990.

/s/ Constance Marie Murphy
Notary Public

AFFIDAVIT

STATE OF OHIO)
) :ss
COUNTY OF LUCAS)

Now comes Andrew Washington, being first duly sworn and states as follows:

1. On or about August 26, 1986, I was injured while working for Consolidated Rail Corporation.

2. On or about August 28, 1990, I met with Attorneys E. J. Leizerman and Michael E. McGill and signed a fee agreement with them and the law firm of Leizerman, McGill & Williams.

3. At no time during our discussion at that time regarding my injuries did Mr. Leizerman or Mr. McGill suggest to, or promise me, that I could get as advance of money to cover my living expenses while my case was being handled.

4. It was not until some time thereafter that the subject of living expenses came up. Mr. Leizerman and Mr. McGill assisted me in obtaining a loan from Trustcorp Bank on or about September or October or 1986. At the time I filled out the loan application I was told clearly by Mr. Leizerman and Mr. McGill and the bank that it was my responsibility to repay the loan, with interest, regardless of the outcome of my case. I fully understood this and agreed to it prior to signing the loan application or receiving any money.

5. Even after I had been off from work for a year the Railroad Retirement's offer of settlement was less than Ten Thousand Dollars ($10,000.00) to settle my claim. It is my opinion and belief that not until Conrail understood they could not wait-me-out, that my case settled for the

more fair and realistic amount of Sixty Thousand Dollars ($60,000.00).

6. That any proceeds from the Trustcorp loan were necessary for the support of my family and were used solely for that purpose.

FURTHER AFFIANT SAYETH NOT.

/s/ Andrew L. Washington

Sworn to before me and subscribed in my presence appeared, Andrew Washington this 17th day of August, 1990.

/s/ Lynn M. Easton
Notary Public

AFFIDAVIT

STATE OF OHIO)
) :ss
COUNTY OF LUCAS)

Now comes Jerry W. Smith, being first duly sworn and states as follows:

1. On or about May 20, 1987, I was injured while working for Consolidated Rail Corporation. Specifically, I injured my right knee while operating a defective spike puller on Conrail's tracks near Millbury, Ohio.

2. That prior to my May 20, 1987 railroad injury, I injured the same knee, on or about April 17, 1986, when I twisted the knee of loose ballast. As a result of this prior injury, I sustained a torn medial meniscus and made a claim against Conrail without benefit of counsel. During the time that my claim was pending, I received One Thousand, Five Hundred Dollars ($1,500.00) in advances from the Conrail Claims Department in Toledo, Ohio.

3. On or about June 20, 1986, I was forced to settle my claim for this April 17, 1986 injury for the total sum of Fifteen Thousand Dollars ($15,000.00), less the $1,500.00 in advances, which netted me $13,500.00. I believed this settlement to be very low, but I was desparate for money and the Claims Department refused to advance any additional money, causing me to accept their offer.

4. When I reinjured my knee on May 20, 1987, I sought to again negotiate with the Claims Department without a lawyer, but I was advised that they were denying this new claim because it was not a new injury. I was advised by Conrail that I already settled for my knee and that they would not advance money or pay for my new claim involving this same knee.

5. On or about July 27, 1987, I met with Attorney Michael E. McGill and signed a fee agreement with Mr. McGill and the law firm of Leizerman, McGill & Williams.

6. At no time during our discussions prior to retaining my lawyers did either Mr. Leizerman or Mr. McGill suggest to, or promise me, that I could get an advance of money to cover my living expenses while my case was being handled. My decision to retain counsel had nothing to do with loan proceeds.

7. It was not until some time thereafter that the subject of living expenses came up. I was unable to work due to my injuries and had no source of income. Mr. Leizerman and Mr. McGill assisted me in obtaining a loan from Trustcorp Bank on or about December 3, 1987. At the time I filled out the loan application I was told clearly by Mr. Leizerman and Mr. McGill and the bank that it was my responsibility to repay the loan, with interest, regardless of the outcome of my case. I fully understood this and agreed to it prior to signing the loan application or receiving any money and I also understand this fact as of this date.

8. That any proceeds from the Trustcorp loan were necessary for the support of my family and were used solely for that purpose. Without these loan proceeds I would not have survived financially and I would have been forced to negotiate with Conrail on the basis of desperation and not the reasonable value of my case.

9. That on or about May 25, 1990, with my consent and through the efforts of my counsel, I settled my May 20, 1987 claim against Conrail.

10. That I am thoroughly satisfied with the representation and efforts of my attorneys and have no complaints about the loan process mentioned herein.

11. That I make these statements as my voluntary act and deed.

FURTHER AFFIANT SAYETH NOT.

/s/ Jerry W. Smith

Sworn to and subscribed by Jerry W. Smith, a person known to me, who appeared and affixed his signature hereinabove in my presence this 26th day of June, 1990.

/s/ Constance Marie Murphy
Notary Public

AFFIDAVIT

STATE OF OHIO)
) ss:
COUNTY OF LUCAS)

NOW COMES Elvin Williams, being first duly sworn and states as follows:

1. On or about November 2, 1988, I was injured while working for Consolidated Rail Corporation.

2. On or about May 24, 1989, I met with attorney E. J. Leizerman and Michael E. McGill and signed a fee agreement with them and the law firm of Leizerman, McGill & Williams to represent me on a Federal Employer's Liability Act Claim.

3. On or about May 10, 1991, I spoke with Mr. Leizerman at his office in Toledo, Ohio and indicated to him that my Benefit Life and Trust benefits have long since expired and my Railroad Retirement Board benefits expired over a year ago.

4. I am currently destitute and I have no monies by which to live. Approximately 90 days ago, I had to sell my car for living expenses; and during the Winter of 1990, I could no longer afford to rent my house and I presently live in the basement of my mother's house with my daughter.

5. I am 34 years old and I have a 16 year old daughter who lives with me. Last month, my mother permitted me to forego rent payment so that I could buy my daughter clothes.

6. I can no longer afford to wait for my day in court. I must either obtain some amount of funds to live on, for basic transportation for medical purposes, for clothing, etc., or I will have no alternative but to accept whatever settlement the railroad is willing to offer to settle my suit.

FURTHER AFFIANT SAYETH NOT

/s/ Elvin Williams

Sworn to before me and subscribed in my presence this 10th day of May, 1991.

/s/ Suzanne M. Kremnetz
Notary

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Elvin Williams	*	Case No. 3:90CV7311
Plaintiff	*	Hon. James G. Carr
vs.	*	**ORDER**
Consolidated Rail Corporation	*	
Defendant	*	

IT IS HEREBY ORDERED that Plaintiffs counsel, E. J. Leizerman be permitted to advance to plaintiff, Elvin Williams, the sum of One Thousand Five Hundred Dollars $1,500.00 for living expenses and that such sum be repaid out of any proceeds of any settlement or judgment.

/s/ James G. Carr
Hon. James G. Carr

[Filed May 23, 1991]

MINNESOTA RULE 1.8

Rule 1.8. Conflict of Interest: Prohibited Transactions

* * *

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter.

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided, that no promise of such financial assistance was made to the client by the lawyer, or by another in the lawyer's behalf, prior to the employment of that lawyer by that client.

* * *

(Amended September 1, 1985.)

DISTRICT OF COLUMBIA RULE 1.8

* * *

(d) While representing a client in connection with contemplated or pending litigation or administrative proceedings, a lawyer shall not advance or guarantee financial assistance to the client, except that a lawyer may pay or otherwise provide:

(1) The expenses of litigation or administrative proceedings, including court costs, expenses of investigation, expenses of medical examination, costs of obtaining and presenting evidence; and,

(2) Other financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding.

* * *

COMMENT:

Paying Certain Litigation Costs and Client Expenses.

[5] Historically, under the Code of Professional Responsibility, lawyers could only advance the costs of litigation. The client remained ultimately responsible, and was required to pay such costs even if the client lost the case. That rule was modified by this Court in 1980 in an amendment to DR 5-103(B) which eliminated the requirement that the client remain ultimately liable for costs of litigation, even if the litigation was unsuccessful. The provisions of Rule 1.8(d) embrace the results of the 1980 modification, but go further by providing that a lawyer may also pay certain expenses of a client which are not litigation expenses. Thus, under Rule 1.8(d), a lawyer may pay medical or living expenses of a client to the extent necessary to permit the client to continue the litigation. The payment of these additional expenses is limited to

those strictly necessary to sustain the client during the litigation, such as medical expenses and minimum living expenses. The purpose of permitting such payments is to avoid situations in which a client is compelled by exigent financial circumstances to settle a claim on unfavorable terms in order to receive the immediate proceeds of settlement. This provision does not permit lawyers to "bid" for clients by offering financial payments beyond those minimum payments necessary to sustain the client until the litigation is completed. Regardless of the types of payments involved, assuming such payments are proper under Rule 1.8(d), client reimbursement of the lawyer is not required. However, no lawyer is required to pay litigation or other costs to a client. The Rule merely permits such payments to be made without requiring reimbursement by the client.

BEFORE THE SUPREME COURT OF OHIO

In Re:	:	
Toledo Bar Association,	:	
Relator,	:	
and,	:	
E.J. Leizerman,	:	Case No. 92-426
Respondent.	:	

RESPONDENT'S OBJECTIONS TO THE BOARD'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS

Charles W. Kettlewell
(0016120)
150 East Wilson Bridge Road
Suite 200
Worthington, Ohio, 43085
(614) 436-2570

Jonathan B. Cherry
(0001126)
424 Spitzer Building
520 Madison Avenue
Toledo, Ohio, 43604
(419) 255-5917

Mark H. Aultman
(0019575)
150 East Wilson Bridge Road
Suite 200
Worthington, Ohio, 43085
(614) 436-2750

Peter L. Moran
(0009936)
Louisville Building
620 Madison Avenue
Toledo, Ohio, 43604
(419) 241-8171

Attorneys for Respondent,
E.J. Leizerman

Attorneys for Relator,
The Toledo Bar
Association

[Filed April 15, 1992]

* * *

Proposition of Law No. Four:

AS DR 5-103(B) IS RECOMMENDED TO BE APPLIED TO RESPONDENTS AND ON ITS FACE IF INTERPRETED TO PROHIBIT ALL GUARANTEES OR ADVANCES EXCEPT THOSE SPECIFICALLY ENUMERATED IN THE RULE, IS UNCONSTITUTIONAL, IN VIOLATION OF THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION AND IN VIOLATION, *INTER ALIA*, OF ARTICLE VI, AND OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

If DR 5-103(B) is interpreted as the Toledo Bar Association seeks to have it enforced against Respondents, for the same and other reasons set forth in the preceding proposition of law, the rule is unconstitutional, depriving them and their clients of rights of due process and equal protection, as guaranteed by the federal constitution, and also as violating the Supremacy Clause of the U.S. Constitution.

As the Toledo Bar and the Board of Commissioners recommend DR 5-103(B) be enforced, attorneys would be deprived of their means of livelihood for guaranteeing loans to clients who need funds in order to obtain redress in state and federal courts. Lawyers may not be disciplined for violating rules which violate the federal constitution, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). Lawyers are entitled to due process, under the U.S. Constitution, in disciplinary proceedings, *In Re Ruffalo* 390 U.S. 544 (1968). State rules regulating attorney misconduct are subject to the operation of the federal Supremacy Clause, *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), *Sperry v. Florida*, 373 U.S. 379 (1963).

Disciplinary Rules that are so vague as to fail to give notice of prohibited conduct, or to permit discriminatory enforcement, may be found to be unconstitutional, *Gentile v. State Bar of Nevada*, 111 S.Ct. 2720 (1991).

In *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964), the U.S. Supreme Court struck down a state regulation of the practice of law which it *found to unreasonably handicap a claimant's right to petition courts* for redress of grievances. In doing so it said (377 U.S. at 7):

> A state could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest . . .

It is clear that disciplinary rules which adversely affect client's constitutional rights, are unconstitutional even if they may not be enforced directly against the client. In *Bates v. State Bar of Arizona*, 433 U.S. 350, at 376, the U.S. Supreme Court said, in finding a disciplinary rule unconstitutional, that:

> The disciplinary rule at issue likely has served to burden access to legal services, particularly for the not-quite-poor and the unknowledgable.

In *Boddie v. Connecticut*, 401 U.S. 371 (1971), where the U.S. Supreme Court held that due process of law prohibits a state from denying access to state courts to poor persons in divorce actions because of inability to pay court costs and fees, the court (at 383) concluded:

> Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so.

Where the issue is not simply one of initial access to the courts but rather the ability to achieve justice where legal analysis has already determined there is a compensable case, it is difficult to see on what basis a client may, by affirmative state action taken against that person's attorney, be deprived of the opportunity to continue if the attorney believes it to be in the mutual interest of each to do so.

The State of Ohio has been down this road before, resulting a situation in which an attorney was suspended in the Ohio courts for conduct which the federal courts found not to constitute a violation of federal law. This ultimately created an unseemly situation in which the attorney was permitted to practice in federal courts in the State of Ohio while being prohibited from practicing in state courts, despite the fact that the procedures in his Ohio suspension were found to have violated the U.S. Constitution. In an action which the U.S. Supreme Court noted [*In Re Ruffalo* 390 U.S. 544 (1968) at 546] had been initiated by a local bar association whose president was local counsel for the B&O Railroad, the Supreme Court of Ohio suspended an attorney for, among other things, advancing living expenses to needy railroad plaintiffs. When an attempt was made to have Mr. Ruffalo suspended in federal district court, that court quoted with approval [*In Re Ruffalo*, 249 F.Supp. 432 (1965) at 445] the *dissenting* opinion in *Mahoning County Bar Association v. Ruffalo, supra* (176 Ohio St. at 263):

> The importance of financial aid from his lawyer to an injured workman may spell the difference between injustice and justice. For example, a member of a railroad train crew or yard crew is injured or killed by reason of the negligence of the railroad. The injured man or the dependents, through a fiduciary, contract with a lawyer to represent them in negotiations for settlement of in litigation. The railroad offers a

> meager totally inadequate settlement — a small percentage of what a lawful judgment could be expected. In making this inadequate settlement offer, the claims department of the railroad advises that the railroad can delay final decision for years. In short, the powerful can close the doors of the courts to the weak by reason of the lack of finances of the claimant.

People who will not learn from the mistakes of the past, it is said, are doomed to repeat them. Courts of law are in the fortunate position, however, of having opportunities to reconsider past decisions, and of being able to use past opinions, including dissenting opinions, as a means of re-evaluation when circumstances have changed.

In addition to violating rights to due process and equal protection guaranteed by the U.S. Constitution, enforcing DR 5-103(B) as the Toledo Bar and the Board of Commissioners recommends would violate the Supremacy Clause of the U.S. Constitution. The federal courts have had occasion to consider the matter of state enforcement of DR 5-103(B). In *County of Suffolk v. Long Island Lighting Co.* 710 F.Supp. 1407 (E.D.N.Y. 1989), involving a class action suit, the court said:

> New York could, of course, attempt to enforce its ethical rule DR5-103(B) by initiating a disciplinary proceeding against a New York lawyer who violated the rule in federal court, even though the federal court had approved this departure from the state rule. Such an attempt by the state, however, would be barred by the Supremacy Clause of the United States Constitution. U.S. Const. Art. VI, Cl. 2.

* * *

IN THE SUPREME COURT OF OHIO

Toledo Bar Association,	*	No. 92-426
Relator	*	**MOTION FOR RECONSIDERATION**
vs.	*	**WITH MEMORANDUM IN SUPPORT**
E.J. Leizerman	*	
Respondent	*	

NOW COMES Respondent, E. J. Leizerman, and pursuant to Sup. Ct. Rule IX hereby applies for a reconsideration of matters not constituting a reargument of the case heretofore considered by the court, but which should be considered by the court, as more particularly set forth in the following Memorandum.

/s/ E. J. Leizerman
E. J. Leizerman
Respondent *Pro Se*

MEMORANDUM

This is a disciplinary proceeding in which a majority of this court issued a public reprimand to Respondent, E. J. Leizerman, for alleged violations of DR 5-103(B) of the Code of Professional Responsibility. Respondent respectfully submits that there is a material difference in the facts between those in his case and those in the companion case of *Toledo Bar Association v. McGill*, No. 92-425, decided simultaneously with the matter *sub judice*, which requires rehearing and reconsideration by the court.

Respondent specifically refers the court to the stipulation of record reflecting that Respondent, E. J. Leizerman only co-signed bank notes for clients whose F.E.L.A. actions were pending in the Federal District Court. In fact, the court should note that some of these clients did not reside in the State of Ohio, yet sought relief in federal court through an Ohio licensed attorney. This decision by Mr. Leizerman to limit the guaranty of notes to federal court clients was based on his perception of the custom and practice of attorneys practicing F.E.L.A. law in the federal courts to advance funds to clients for living expenses.

In this light, Mr. Leizerman was aware of Rule 39 of the United States District Court for the Northern District of Illinois (attached as Appendix D, Respondent's Objections to the Board's Finding of Fact, Conclusions of Law and Recommendations) authorizing the advancing or lending of money. Mr. Leizerman also sought and received an order from United States Magistrate James G. Carr of the Northern District of Ohio (attached as Exhibit E to Respondent's Objections) to advance money to one F.E.L.A. client, Elvin Williams, when the issue was presented to him by the Toledo Bar Association, yet when this court denied his motion to advance living expenses on October 23, 1991 in Case No. 91-1879, Mr. Leizerman deferred to this ruling and declined to advance monies or guaranty notes thereafter.

The Co-Respondent in this case, Michael E. McGill, did not limit the procurement of bank notes to federal court clients and Mr. Leizerman believes this to be a subtle yet significant distinction between the two cases which the court perhaps did not fully appreciate as it relates to Mr. Leizerman's genuine belief that how he conducted himself would in no way impinge on Ohio DR 5-103. Mr. Leizerman raised a constitutional challenge to DR 5-103(B) under, *inter alia*, the Supremacy Clause of the U. S.

Constitution based upon his federal court representation and practice. This court recognized that such an issue was raised before the Board of Commissioners who decided they were without jurisdiction to consider the same. This issue was also presented in the Briefs filed in this court (See Proposition of Law No. 4). It is submitted, however, that the court, no doubt inadvertently, failed to decide the constitutional due process, equal protection and Supremacy Clause issues as set forth in Propositions 3 and 4 or the issue of apparent propriety or genuine belief. Mr. McGill's case could not and did not take the same posture as he appeared to knowingly violate the rule.

Mr. Leizerman only did what other non-Ohio attorneys have traditionally done when they have appeared in the same U.S. District Courts for the Northern District of Ohio on behalf of F.E.L.A. clients. These attorneys are not sanctioned or disciplined in any way, yet they come into this state and into the same courthouse and do precisely what Mr. Leizerman has done.

To impose the sanction of reprimand upon Mr. Leizerman would seemingly require this court to impose a like sanction upon Magistrate James G. Carr who is a member of the Ohio Bar and who, in the exercise of his discretion and in the sincere belief that his and Mr. Leizerman's conduct was acceptable within the federal court system under the Supremacy Clause, entered an order allowing Mr. Leizerman to advance funds to client Elvin Williams. There is clearly a divergence between state and federal power here, of great constitutional dimension. It is therefore imperative for this court to reconsider its prior opinion in this case in light of the constitutional arguments previously raised with regard to the Supremacy Clause, as well as the doctrines of apparent propriety or genuine belief and Rule IV of this Court, which requires that an attorney commit a willful breach of the Code of

Professional Responsibility before discipline will be imposed.

Finally, there is a major distinction between the conduct of Mr. Leizerman and Mr. McGill in these cases. Although Mr. Leizerman has always recognized the posture with this court with respect to DR. 5-103, he maintains his belief that his conduct did not fall below the ethical standards that existed in the United States District Court. These loans were not made in a clandestine or secretive manner; they were open and above-board, and made through a reputable lending institution for a very small percentage of Mr. Leizerman's clients, all of whom had F.E.L.A. cases pending in the United States District Court.

It is not fair to punish Mr. Leizerman for conduct that, on its face, appeared to be within both the province and discretion of the ethical standards of the U.S. District Court. It is equally clear that unlike the situation with Mr. McGill, Mr. Leizerman declined to enter into this type of arrangement with any other clients. Thus, it was unfair for the court to mete out the same punishment to both Mr. Leizerman and Mr. McGill on the disparate facts presented.

WHEREFORE, it is respectfully submitted that the court reconsider its previous ruling against Respondent E. J. Leizerman in case No 92-426 and, upon reconsideration, dismiss the complaint against him.

Respectfully submitted,
/s/ E. J. Leizerman
E. J. Leizerman (0011300)
Respondent, *Pro Se*
717 Madison Avenue
Toledo, Ohio 43624
(419) 243-1010
Fax: 243-8200

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No. 92-1266

IN THE

Supreme Court of the United States

October Term, 1992

E. J. LEIZERMAN,
Petitioner,

vs.

TOLEDO BAR ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN K. NELSON
Counsel of Record
COOPER, STRAUB, WALINSKI & CRAMER
900 Adams Street
Toledo, Ohio 43624
(419) 241-1200

JONATHAN B. CHERRY
434 Spitzer Building
520 Madison Avenue
Toledo, Ohio 43604-1302
(419) 255-5917

Attorneys for Respondent

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTIONS PRESENTED

1. May states, consistent with the Supremacy Clause, enforce Disciplinary Rule 5-103(B) which prohibits lawyers from guaranteeing their clients' loans for medical and living expenses while representing them on pending litigation involving claims under the Federal Employers Liability Act (FELA) or under state law?

2. Does the state disciplinary rule prohibiting attorneys from guaranteeing their clients' loans for medical and living expenses during pending litigation violate any constitutional rights of Petitioner or his clients?

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No. 92-1266

IN THE

Supreme Court of the United States

October Term, 1992

E. J. LEIZERMAN,
Petitioner,

vs.

TOLEDO BAR ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

This action was commenced on October 18, 1990 when the Respondent Toledo Bar Association filed a complaint with the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio alleging that Petitioner had violated DR 5-103(B) of the Ohio Code of Professional Responsibility, in that he had guaranteed, as co-maker, bank loans made to twelve

clients of Petitioner's firm. The loan guarantees totalled $93,800 as of November 15, 1989. Petitioner's Appendix, A1, A2, A10.

Respondent does not dispute much of Petitioner's description of what transpired before the Board of Commissioners and the Supreme Court of Ohio. To the extent that Petitioner paraphrases the findings of those bodies, the actual findings are set forth in Petitioner's Appendix. Respondent does, however, dispute Petitioner's statement of the case to the extent that it contains argument. *See, e.g.,* Petition, p. 3.

Petitioner's statement of the case contains much self-serving "evidence" that he presented to the Board of Commissioners in an effort to justify his conduct and to demonstrate that the enforcement of DR 5-103(B) impaired the rights of some of his clients to pursue claims under the FELA. *See, e.g.,* Petition, pp. 4-5. Respondent did not dispute most of this evidence during the disciplinary proceeding below because it was irrelevant to the issues at hand. The evidence was irrelevant to whether Petitioner violated DR 5-103(B) and to whether DR 5-103(B) violated the Supremacy Clause. The evidence also did not affect the outcome of Petitioner's other constitutional claims which failed because, even if DR 5-103(B) had denied the rights of Petitioner's clients to access to the courts, the disciplinary rule did not infringe on a fundamental right and it bore a rational relation to legitimate state interests.

Petitioner's statement of the case falsely states that "the Ohio and federal court precedents . . . are in direct conflict" on the issue of whether it is permissible for lawyers to guarantee loans for living expenses to clients. *See* Petition, p. 5. There is no conflict between Ohio's DR 5-103(B) and the two federal court precedents relied upon

by Petitioner. The first federal precedent Petitioner cites is a 1965 decision by a federal district judge in Cleveland which interpreted a canon of professional ethics that no longer exists. *In re Ruffalo*, 249 F. Supp. 432 (N.D. Ohio 1965). The ethical canon interpreted in *Ruffalo* was superseded in 1970 when Ohio adopted DR 5-103(B) which expressly prohibits Petitioner's conduct in this case.

Nor is DR 5-103(B) in "direct conflict" with an order that Petitioner himself procured in 1991 from a U.S. Magistrate in an apparent attempt to bolster his Supremacy Clause argument in this case. Neither the motion that Petitioner filed with the Magistrate nor the resulting order addressed DR 5-103(B).

On May 23, 1991, while this disciplinary proceeding was pending but before the hearing thereon, and without notice to the Respondent Bar Association, Petitioner sought an order from the U.S. Magistrate in Toledo purporting to authorize Petitioner to lend $1,500 to Elvin Williams, a client of Petitioner who was not among the twelve clients who were the subject of the present disciplinary proceeding. *See* attached Appendix A1. Petitioner did not inform the Magistrate that there was a disciplinary case pending against him relating to financial assistance he provided to his other clients. Nor did Petitioner even discuss DR 5-103(B) with the Magistrate. Hearing Tr. at 136, 147-48. To the contrary, Petitioner's motion gave the Magistrate the misleading impression that the proposed loan to Mr. Williams constituted acceptable practice:

> "In this regard, the trend nationally is for the courts to not only recognize these needs, but to authorize advances or loans for living expenses."

See attached Appendix A2.

Petitioner's motion before the Magistrate was not opposed. On the same day the motion was filed, the Magistrate issued a one sentence order authorizing Petitioner to make the proposed loan. *See* Petitioner's Appendix A26. The Magistrate's order does not address, or even mention, DR 5-103(B).[1]

One final aspect of Petitioner's statement of the case needs to be clarified. Not all of the clients for whom Petitioner guaranteed loans were FELA claimants with cases pending in federal court. The Petitioner guaranteed loans for three personal injury clients who were pursuing claims for uninsured or underinsured motorist coverage under state law. *See* Petitioner's Appendix A2, A8, A9 and A11.

[1] On September 19, 1991, Petitioner filed a motion with the Ohio Supreme Court seeking permission to make the loan to Mr. Williams. That motion was denied on October 23, 1991. *See* attached Appendix A4.

REASONS FOR DENYING THE WRIT

I. Ohio's Disciplinary Rule Prohibiting Loan Guarantees To Clients Does Not Violate The Supremacy Clause.

A. There is no conflict between state and federal law on this issue.

Ohio's Dr 5-103(B) does not violate the Supremacy Clause because it does not conflict with any established federal law. There is no federal rule, code or statute which authorizes an attorney to guarantee loans to clients in litigation. The FELA does not encourage, authorize or empower plaintiff's lawyers to advance or guarantee loans to their clients. Nor do the rules of the United States District Court for the Northern District of Ohio authorize such conduct. In the absence of some federal law which arguably conflicts with the state law under review, the Supremacy Clause is inapplicable. *English v. General Electric Co.*, 496 U.S. 72 (1990) ("State law is pre-empted to the extent that it actually conflicts with federal law").

Petitioner's Supremacy Clause argument is based solely on two decisions by federal district courts in Ohio. Neither of these decisions, however, conflicts with the Ohio Supreme Court's enforcement of DR 5-103(B).

The *Ruffalo* decision cited by Petitioner was issued five years before DR 5-103(B) was adopted. *See In re Ruffalo*, 249 F. Supp. 432 (N.D. Ohio 1965). The district judge in *Ruffalo* interpreted a previously-existing canon of professional ethics which did not specifically address advances or guarantees of financial assistance to clients (other than for expenses of litigation), but rather prohibited in broad language the acquisition of an interest in litigation. *Id.* at 440-41. The district judge

disagreed with the conclusion of the Ohio Supreme Court that the attorney violated this canon when he made small loans to a few of his clients for living expenses. *Id.* at 443.[2]

Five years after *Ruffalo*, the Ohio Supreme Court adopted DR 5-103(B), which clearly and unambiguously prohibits loan guarantees to clients for medical and living expenses. Because the *Ruffalo* Court interpreted and applied a rule other than 5-103(B), there is no conflict between that decision and Ohio's disciplinary rules.

The order that Petitioner obtained from the U.S. Magistrate in the *Elvin Williams* case adds nothing to his Supremacy Clause argument. Neither the motion filed by Petitioner, nor the order issued by the Magistrate, addressed the ethical issue presented by DR 5-103(B). Because the purported conflict between Ohio's rule and federal law is illusory, this Court's intervention is unnecessary.

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[2] The Sixth Circuit Court of Appeals criticized the district judge's decision in *Ruffalo* regarding the loan guaranteees. *In re Ruffalo*, 370 F.2d 447, 450 (6th Cir. 1966) *rev'd on other grounds*, 390 U.S. 544 (1968).

B. The Supremacy Clause does not apply to Petitioner's disciplinary violation as it pertains to the three non-FELA clients.

Even if Petitioner's Supremacy Clause argument had merit, it would not change the result in this case. Petitioner's public reprimand was based in part on conduct unrelated to any federal law or case. Both the Board of Commissioners and the Ohio Supreme Court found that the testimony was uncontroverted that Petitioner co-signed notes for clients involved in non-FELA cases after funds had been disbursed to clients. *See* page 4 *supra*. While his co-signing on those loans apparently facilitated renewals, rather than advancements, of loans to those clients, his conduct clearly fell within the prohibition of DR 5-103(B) against guarantees of financial assistance to clients.

Petitioner's conduct in the non-FELA cases provides an adequate and independent basis for his discipline which does not raise issues of federal or constitutional law. This case is not, therefore, appropriate for Supreme Court review.

II. The State Court's Enforcement Of DR 5-103(B) Does Not Deny Anyone's Access To The Courts And Does Not Deny Rights Protected By The First Amendment, The Due Process Clause Or The Equal Protection Clause.

Petitioner's remaining constitutional arguments are based on the false premise that the state court's enforcement of DR 5-103(B) results in a denial of the rights of Petitioner's clients to access to the courts.[3] Petitioner's clients all had full access to the federal courts to litigate their FELA claims.

Contrary to Petitioner's suggestion, DR 5-103(B) does not deny financial assistance to Petitioner's clients during the pendency of the litigation. The rule merely denies them financial assistance from one specified source—*i.e.* from their attorney. Petitioner admitted at the hearing below that other lawyers are able to avoid guaranteeing loans for their clients by arranging financial assistance from third parties. Hearing Tr. at 39.

A. There is no protected First Amendment right to provide financial assistance to clients.

The right to lend money to clients, or to guarantee loans made to clients, is not a right protected by the First Amendment. Unlike the rights addressed in the cases cited by Petitioner, it does not involve considerations of the freedom of association (the *Button*,

[3] It is certainly unclear whether Petitioner has standing to assert constitutional claims which are based on alleged deprivations of the rights of third parties. Ordinarily, a litigant "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) (*quoting Warth v. Seldin*, 422 U.S. 490, 499 (1972)).

Primus and *United Mine Workers* cases) or considerations of free speech (the *Bates, Gentile, Shapero* and *Zauderer* cases).

The extension of loans or other financial assistance to clients is a purely commercial activity subject to state regulation. This Court has held that commercial activities of lawyers fall within a field traditionally subject to government's economic and professional regulation. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978).

B. Enforcement of DR 5-103(B) does not violate Due Process.

For purposes of a Due Process analysis, an individual's right to pursue a civil action seeking money damages for personal injuries is not a fundamental right. Nor does a person have a fundamental right to receive financial assistance from his attorney or to be free from economic pressures while maintaining his civil lawsuit. A state law which is alleged to infringe on such rights, therefore, will withstand a Due Process challenge if it bears a rational relation to a legitimate state objective. *See e.g., Whalen v. Roe*, 429 U.S. 589, 597 (1977). DR 5-103(B) comports with Due Process because it bears a rational relation to several legitimate state interests.

States have a substantial interest in regulating the practice of law within their borders. *Sperry v. State of Florida*, 373 U.S. 379, 383 (1963); *Ohralik, supra*, 436 U.S. at 460. The rule prohibiting loans to clients for living expenses has been adopted by most states. The rule was incorporated in the ABA's 1969 Code of Professional Responsibility (DR 5-103(B)) and was preserved in the ABA's 1983 Model Rules of Professional Conduct (Rule 1.8(e)).

There are many legitimate state interests supporting DR 5-103(B). The rule rests upon the policy of discouraging a lawyer from acquiring a financial interest in litigation, to insure that the lawyer's independent professional judgment is not clouded by extraneous concerns. The existence of a loan or guarantee increases the lawyer's ability and motive to overreach in dealings with his client. It forces the lawyer to consider his own economic interests in exercising legal judgment, and opens the way for his substitution of his own interests for those of his client. *In re Stewart*, 121 Az. 243, 589 P.2d 886, 888 (1979); *Shea v. Virginia State Bar*, 236 Va. 442, 374 S.E.2d 63 (1988); *Kentucky Bar Ass'n v. Mills*, 808 S.W.2d 804 (Ky. 1991). The existence of a loan or loan guarantee also reduces or eliminates, as a practical matter, the client's right to discharge the lawyer. *In re Brown*, 298 Ore. 285, 692 P.2d 107 (1984).

By prohibiting financial assistance to clients for living expenses in all cases, DR 5-103(B) prevents improper competition among lawyers on the basis of their expenditures to clients. *Attorney Grievance Comm'n of Maryland v. Kandel*, 317 Md. 274, 563 A.2d 387, 390 (1989). The rule also prevents the prospect of financial assistance from being used as a form of solicitation for future cases and new clients. *In re Reaves*, 250 S.E.2d 329, 331 (S.C. 1978). *See also* Petitioner's Appendix A6 (Holmes *J.*, dissenting). If publicized, either by the lawyer or by word of mouth, the financial assistance is, or gives the appearance of being, an inducement to attract business and is an improper basis for a client's choosing a particular lawyer or firm. *In re Carroll*, 124 Az. 80, 602 P.2d 461, 467 (1979).

Finally, often the only witnesses to the circumstances of the loan would be the parties thereto, rendering the transaction virtually immune from effective scrutiny and oversight by the courts or the profession "in contravention of the State's strong interest in regulating members of the Bar in an effective, objective, and self-enforcing manner." *Ohralik, supra*, 436 U.S. at 467-468.

For all of these reasons, the State of Ohio was well within its authority to determine that the practice of making and guaranteeing loans to clients for living expenses is incompatible with the practice of law. That determination is certainly not an irrational one in violation of Due Process.

C. Petitioner's Equal Protection challenge to DR 5-103(B) is meritless.

Petitioner's Equal Protection argument is based on the fact that DR 5-103(B) creates a distinction between *types of advancements* to clients. Such a distinction does not trigger Equal Protection considerations. In order to subject a law to review under the Equal Protection Clause, one must be able to demonstrate that the law classifies *persons* in some manner.

Apparently recognizing that fact, Petitioner suggests at the end of his Equal Protection analysis that the burden imposed by DR 5-103(B) falls only upon poor clients. This suggestion, however, adds nothing to Petitioner's argument. A classification based on economic status or wealth has not been regarded by this Court as suspect. *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1973). This Court has upheld many legislative actions which have burdened poor persons if the actions have a rational relationship to any legitimate

end of government, at least where the legislative action did not infringe upon a fundamental right. *See, e.g., United States v. Kras*, 409 U.S. 434 (1973).

DR 5-103(B) does not create a suspect classification or infringe on a fundamental right of Petitioner or his clients. The rule, which is the law of most states in this country, clearly bears a rational relation to legitimate state objectives. *See* pages 9-11 *supra*.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN K. NELSON
Counsel of Record
COOPER, STRAUB, WALINSKI
& CRAMER
900 Adams Street
Toledo, Ohio 43624
(419) 241-1200

JONATHAN B. CHERRY
434 Spitzer Building
520 Madison Avenue
Toledo, Ohio 43604-1302
(419) 255-5917

Attorneys for Respondent

APPENDIX

(Filed May 23, 1991)

Case No. 3:90CV7311

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ELVIN WILLIAMS,
Plaintiff,

vs.

CONSOLIDATED RAIL CORPORATION,
Defendant.

HON. JAMES G. CARR

MOTION FOR AUTHORIZATION TO ADVANCE MONEY FOR LIVING EXPENSES

NOW COMES Plaintiff, by and through counsel, and hereby makes application to the court for an order authorizing plaintiff's counsel, E. J. Leizerman, to advance to plaintiff, the sum of One Thousand Five Hundred Dollars $1,500.00 for living expenses such sums to be repaid out of the proceeds of any settlement or judgment.

E. J. LEIZERMAN
Attorney for Plaintiff

MEMORANDUM

This is an action for injuries sustained by the plaintiff, Elvin Williams, in the course of his employment with defendant, Consolidated Rail Corporation. The action is brought solely and exclusively pursuant to the Federal Employers' Liability Act, 45 U.S.C. Sec. 51 *et seq.*

As can be seen from the attached affidavit, plaintiff is indigent. His railroad benefits have expired (par. 3); he sold his car for living expenses (par. 4); he lives with his mother because he cannot afford to pay rent (par. 4, 5). Plaintiff therefore has a real need for funds in order to see his case through to a reasonable conclusion.

Accordingly, plaintiff respectfully requests authorization from this court for his attorney to advance or loan him money for living expenses. It will be noted that Conrail itself advances money to injured workers for living expenses, but these have long since terminated (two years ago).

In order for plaintiff to continue to prosecute this action, he turns to this court for authority to obtain advances for living expenses. In this regard, the trend nationally is for the courts to not only recognize these needs, but to authorize advances or loans for living expenses. The court's attention is directed to General Rule 39 of the United States District Court for the Northern District of Illinois, a copy of which is attached hereto, which specifically permits such a practice. In relevant part, the Rule provides:

> Upon good cause shown, however, the Court may, after proper filing of a complaint, authorize the advancing or loaning of money to an indigent plaintiff by the attorney for court costs, medical and living expenses subject to reimbursement out of the proceeds of any settlement or judgment.

Plaintiff submits that the procedure outlined above by the Northern District of Illinois is a salutary one which provides full disclosure to the court and all counsel. By making this application, plaintiff is merely following the prudent course of seeking judicial sanction for something that is already being done in other federal district courts.

WHEREFORE, plaintiff respectfully prays that this motion be granted.

Respectfully submitted,

E. J. LEIZERMAN (0011300)
Attorney for Plaintiff

E. J. LEIZERMAN & ASSOCIATES
717 Madison Avenue
Toledo, Ohio 43624
(419) 243-1010
Fax: 243-8200

CERTIFICATION

This is to certify that a copy of the foregoing Motion for Authorization was mailed this _____ day of May, 1991 to Richard F. Ellenberger, DOYLE, LEWIS & WARNER, 202 North Erie Street, P.O. Box 2168, Toledo, Ohio 43603.

E. J. LEIZERMAN
Attorney for Plaintiff

Case No. 91-1879

THE SUPREME COURT OF OHIO

TOLEDO BAR ASSOCIATION,
Respondent,

v.

E. J. LEIZERMAN,
Movant.

To wit: October 23, 1991

ENTRY

This cause came before the Court upon movant's motion to be permitted to advance living expenses to clients. Upon consideration thereof,

IT IS ORDERED by the Court that said motion to be permitted to advance living expenses to clients be, and the same is hereby, denied.

/s/ THOMAS J. MOYER
Chief Justice

No. 92-1266

Supreme Court, U.S.
FILED
MAR 23 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

E. J. LEIZERMAN

Petitioner,

v.

TOLEDO BAR ASSOCIATION

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Michael E. Tankersley
(Counsel of Record)
Alan B. Morrison
Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 833-3000

Mark H. Aultman
Charles W. Kettlewell
150 E. Wilson Bridge Road
Suite 200
Worthington, Ohio 43085
(614) 436-2750

Counsel for Petitioner

March 19, 1993

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Ohio Code of Professional Responsibility, DR 5-103(B) . . . . . *passim*

In The

Supreme Court of the United States

October Term, 1992

No. 92-1266

E. J. LEIZERMAN

Petitioner,

v.

TOLEDO BAR ASSOCIATION

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

In its Opposition, Respondent repeatedly emphasizes that the absolute prohibition against lawyers guaranteeing loans to indigent clients for living expenses that are needed to withstand delays in litigating their personal injury claims is the longstanding rule of *Ohio*, and has been adopted by most other *states*. *See* Respondent's Opposition ("Resp. Opp.") at 3, 9, 12. Petitioner does not dispute these observations, but they only underscore the need for review by this Court. While DR 5-103(B) forbids loan guarantees such as those involved here as a matter of the law of Ohio, that prohibition is in direct conflict with *federal law*. The federal district court in Ohio has ruled that such a prohibition improperly interferes with the ability of claimants under the Federal Employers' Liability

Act, 45 U.S.C. §§ 51-60 ("FELA"), to vindicate their federal rights. *In re Ruffalo*, 249 F. Supp. 432, 445 (N.D. Ohio 1965). Moreover, the federal court rejected Ohio's ban on lawyer assistance for medical and living expenses because it recognized that such a bar interferes with the claimants' rights of access to the courts when it is applied, as here, to prohibit assistance to personal injury victims who may otherwise be forced to abandon or accept inadequate settlement of their claims because of litigation delays. *Id.* at 441-44.

Respondent does not dispute the significance of these issues. Instead, it attempts to dismiss the conflict between state and federal law at issue in the first question presented, and to contest the merits of the second. These arguments miss the mark and, as we show below, only highlight the need for review.

I.

A. As the Petition shows, this case presents important constitutional issues concerning the authority of states to discipline attorneys representing claimants under a federal statute in federal court for conduct that the federal courts have explicitly approved because it fosters the vindication of federal rights. *See* Petition at 11, 16-19. Respondent's rejoinder -- namely that there is no conflict between federal and state law -- is simply erroneous. In the Federal District Court for the Northern District of Ohio the governing law is the decision in *In re Ruffalo*, which explicitly held that federal law rejects as unjust the very prohibition on assistance to indigent clients that the state enforced against Petitioner in the proceedings below. 249 F. Supp. at 442-45. This decision has not been displaced by any contrary federal decision, rule, or statute, and the federal court in Ohio still permits lawyers to assist FELA claimants who need help with living or medical expenses to withstand delays in litigation. *See* Petitioner's Appendix ("Pet. App.") at A26.

Respondent's "no conflict" claim is based on its mistaken contention that the *Ruffalo* decision was

"superseded in 1970 when Ohio adopted DR 5-103(B)." Resp. Opp. at 3, 6. This assertion ignores the settled doctrine that state codes of professional conduct do *not* control the standards of professional conduct in federal courts. *In re Snyder*, 472 U.S. 634, 645 n.6 (1985); *In re Ruffalo*, 390 U.S. 544, 547 (1968). Thus, the state's codification of its prohibition on such assistance cannot "supersede" a prior federal court decision declaring the federal law on professional conduct. Moreover, it is well-established that federal law preempts state practice rules that have the effect of defeating federal rights under the FELA. *See* Petition at 16.

The same misconception underlies Respondent's argument that the 1991 Order by the Federal District Court for the Northern District of Ohio approving petitioner's motion for permission to guarantee a loan for living expenses to an FELA claimant "adds nothing" because the motion and the Order did not cite DR 5-103(B) of the Ohio Code. Resp. Opp. at 6. There was no need to cite the state rule because the applicable law in the federal court is that of the federal district court, not the contrary state rule.[1] Indeed, the proceedings concerning this client (who was not among the clients whose loans were the basis for the disciplinary proceeding) vividly demonstrate the predicament that the decision below creates for members of the Ohio bar, like petitioner, who represent FELA claimants in federal court. Because the state disciplinary proceedings at issue here were pending, as a precautionary measure petitioner did not provide assistance after the federal court order was entered in May 1991, but instead filed a motion for leave from the Supreme Court of Ohio to advance expenses to this FELA claimant as authorized in the federal order. Hearing Tr. at 119-121. The Ohio Supreme Court, as Respondent acknowledges, denied the motion, despite the

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[1] Moreover, the Magistrate who granted the motion was a member of the Ohio bar and was presumably aware of the state's contrary rule. Hearing Tr. at 55, 135-36.

contrary ruling by the federal court. Resp. Opp. at 4 n.1 and A4. As a result, although the federal court with jurisdiction over the FELA claim had authorized assistance (*see* Pet. App. at A26), no assistance was provided because Petitioner was also subject to a contrary order from the Ohio Supreme Court refusing to approve that very same assistance (*see* Resp. Opp. at A4).[2]

Thus, there could not be a more direct conflict between the state and federal law. Review by this court is essential to avoid the threat to the federal authority created by Ohio's use of its disciplinary authority to punish attorneys practicing in federal courts for actions authorized by the federal court. *See* Petition at 18-19 (citing cases holding that application of state disciplinary rules to practice in federal court is preempted). In addition, this Court should grant review, as it has in past cases, to ensure that the federal rights protected by the FELA are not defeated by rules of local practice. *Cf. Brown v. Western Railway of Alabama*, 338 U.S. 294, 296 (1949).

B. Respondent's alternative argument for not granting review on the first issue -- that there is an independent and adequate state ground for the discipline -- is also erroneous, as demonstrated by the findings made by the Board of Commissioners and adopted by the Ohio Supreme Court. In the proceedings below, the parties stipulated that Petitioner did not procure funds for the three non-FELA clients, but assisted in the procurement

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[2] Respondent's charge that the federal court's Order should be ignored because the motion upon which it was based gave the "misleading impression" that "'the trend nationally is for the court . . . to authorize advances or loans for living expenses,'" Resp. Opp. at 3, is frivolous. The record below includes ample, uncontested evidence that there is a trend in some federal courts and a few states to authorize such loans for the very reasons identified in the *Ruffalo* decision. *See, e.g.,* Hearing Tr. at 229-32; Pet. App. at A17-18; *see also id.* at A27-A29 (Minnesota and District of Columbia rules explicitly authorizing such loans).

of loans *only* for the nine FELA clients. Pet. App. at A2, A8-A9. Petitioner co-signed three non-FELA notes previously procured by the other attorney charged in the disciplinary proceedings, his former associate, Mr. McGill, in order to protect the integrity of loans for FELA clients. Pet. App. at A2. But Petitioner's conduct "did not directly result in the advancing of any money to those [non-FELA] clients." *Id.* at A2, A11; *see* Petition at 5 & n.1. Thus, the co-signing of the non-FELA notes did not "advance or guarantee financial assistance" to the non-FELA clients in violation of DR 5-103(B), and did not provide the basis for the state's disciplinary action. In imposing discipline, the Ohio Supreme Court held that DR 5-103(B) prohibited both Petitioner's conduct in aiding FELA claimants and Mr. McGill's conduct in procuring funds for non-FELA client -- completely ignoring the fact that Petitioner's actions were governed by, and permitted under, federal law.

II.

Respondent asserts that the second question presented is not worthy of review by arguing that the prohibition on assistance for medical or living expenses needed to withstand litigation delays (i) does not interfere with any constitutionally protected rights; and (ii) is rationally related to legitimate state interests. The findings below, however, contradict Respondent's argument and demonstrate why this case is an ideal vehicle for this Court to address the First Amendment, Due Process, and Equal Protection issues raised by the blanket prohibition of all lawyer assistance to indigent clients for medical and living expenses.

First, Respondent claims that there is no interference with constitutionally protected rights because clients who need assistance to avoid being forced to settle their claims prematurely can obtain it from third parties. Resp. Opp. at 8. But this argument is belied by the uncontested facts. The loans at issue here were, in fact, made by a third party, a commercial bank. Pet. App. at A11. The

attorney's guarantee, however, was necessary to provide security for the bank loan and, without the guarantee, the FELA claimants would have been unable to withstand the court delays and obtain a hearing on their claim. Pet. App. at A11-12.

Second, Respondent's recitation of the legitimate state interests that have been cited in other contexts as the justification for DR 5-103(B), Resp. Opp. at 10, is unavailing because the findings below show that *none* of these interests is served by the application of the rule to the conduct at issue here. The Board and the Ohio Supreme Court acknowledged in their findings that there was no interference with the attorney's independent professional judgment, and that the guarantees were not used to solicit clients. Pet. App. at A3. Nor could concern that "the only witnesses to the circumstances of the loan would be the parties thereto," Resp. Opp. at 11, justify prohibiting these loans, especially in light of the Board's explicit finding that the loans "were facilitated openly from a recognized financial institution." Pet. App. at A3.

In addition, as noted in the Petition, all of the asserted state interests are equally applicable to contingency fee arrangements, and to advances for litigation costs and expenses, that are permitted under the state professional codes of Ohio and other states. Petition at 8, 27-28. The fact that the state permits these arrangements, but arbitrary prohibits attorneys from assisting indigent clients who need medical or living expenses to continue to pursue their claims demonstrates that the rule is not based on rational distinctions or narrowly tailored to serve its purpose, as is required for it to withstand constitutional scrutiny. *Id.* at 23-24, 28-29.

Thus, as in past cases in where this Court has held that disciplinary actions impermissibly infringe on constitutional rights, the decision below involves the application of a categorical disciplinary rule in a manner that does not rationally serve the state interests that supposedly justify the rule. *See, e.g. Zauderer v. Office of*

Disciplinary Counsel, 471 U.S. 626, 644-45 (1985); *NAACP v. Button,* 371 U.S. 415, 444 (1963). Indeed, the only effect of applying DR 5-103(B) to prohibit the loan guarantees at issue in this proceeding is to deny needy clients who have valid FELA claims the assistance with medical and living expenses they need to avoid being forced to accept an unjust settlement. Thus, this case squarely presents substantial constitutional issues of widespread significance that warrant review by this Court.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

Michael E. Tankersley
(Counsel of Record)
David C. Vladeck
Alan B. Morrison
Public Citizen
Litigation Group
2000 P Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 833-3000

Mark H. Aultman
Charles W. Kettlewell
150 East Wilson Bridge Rd.
Suite 200
Worthington, Ohio 43085
(614) 436-2750

Counsel for Petitioner

March 19, 1993